TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1136.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, APPELLANT,

vs.

THE TOWN OF MILFORD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 8, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 18, 1887.

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, judge of the district court of the United States for said northern district of Illinois, on Tuesday, the fifth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and twelfth year.

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

ÆTNA LIFE INSURANCE COMPANY, *vs.* THE TOWN OF MILFORD *et al.* } In Chancery.

Be it remembered that on the twenty-seventh day of May, 1886, came the complainant, by its solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, its bond for costs and bill of complaint in said above-entitled cause, which said bond and bill are respectively in the words and figures following, to wit:

2 *Bond for Costs.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Circuit Court United States of America. May Term, A. D. 1886.
In Equity.

THE ÆTNA LIFE INSURANCE COMPANY
vs.
THE TOWN OF MILFORD *et al.*

I do hereby enter myself security for costs in this cause and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this 24 day of May, 1886.

O. J. BAILEY.

Endorsed: Filed May 27, 1886. Wm. H. Bradley, clerk.

3 In Circuit Court. May Term, A. D. 1886.

UNITED STATES OF ANERICA, *Northern Dist. of Illinois,* } *ss:*

To the honorable the judges of the circuit court of the United States for the northern district of Illinois:

The Ætna Life Insurance Company, a corporation constituted by the laws of the State of Connecticut and having its office and prin-

cipal place of business at Hartford, in said State, and a citizen of said State, brings this its bill in equity against the town of Milford, a municipal corporation under the laws of the State of Illinois, situated in the county of Iroquois, in said northern district, and a citizen of said State of Illinois, and against the Chicago, Danville & Vincennes Railroad Company, a corporation under the laws of Illinois and a citizen thereof.

And thereupon your orator showeth to your honors:

That in the year 1865 the said Chicago, Danville & Vincennes Railroad Company was incorporated under the laws of the State of Illinois with power to construct a railroad in said State from a point in Lawrence county by way of Danville to the city of Chicago. For more full information as to the powers and duties of the said railroad company, and as to the location and objects thereof your orator refers your honors to the act of incorporation in the Private Laws of Illinois, volume 2, page 140.

For the purpose of aiding said company in the construction of its railroad the Legislature of Illinois, on the 7th day of March, 1867, passed an act, entitled "An act to authorize cities, towns, or townships lying within certain limits, to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville & Vincennes railroad, approved March 7, 1867," to which act, as recorded in the Private Laws of Illinois, volume 1, page 842, reference may be had.

Your orator avers that said act authorized all incorporated towns and cities and towns acting under township organization lying wholly or in part within twenty miles of the east line of the State of Illinois, and also between the city of Chicago and the southern boundary of Lawrence county, in said State, to appropriate such sums of money as they should deem proper to the said Chicago, Danville & Vincennes Railroad Company, to aid it in the construction of its road, to be paid as soon as the track of said road
4 should be laid and constructed through such cities, towns, or townships: Provided, however, that a proposition to make such appropriation should first be submitted to a vote of the legal voters of such cities, towns, or townships at a regular, annual, or special meeting of which at least ten days' previous notice should be given, and also provided that a vote should be taken on such proposition, by ballot, at the usual place of election, and that a majority of the votes cast should be in favor of the proposition; and your orator further avers that said act authorized and required the authorities of such cities, towns, and townships to levy and collect such taxes and to make such other provisions as might be necessary and proper for the prompt payment of such appropriations so made.

And your orator showeth to your honors that in and during the years 1867 and 1868 the town of Milford, in said county of Iroquois, was acting under township organization, pursuant to the laws of Illinois, and was within the limits named in said act, lying, as it did, wholly or in part within twenty miles of the east line of the State of Illinois, and also between the city of Chicago and the southern boundary of Lawrence county, before named, and so was duly

authorized by said act to make appropriations to said railroad company, in the mode prescribed in said act, to aid it in the construction of its road, and that the authorities of said town were both authorized and required to levy and collect such taxes and to make such other provisions as might be necessary and proper for the prompt payment of such appropriations.

And now your orator showeth to your honors that on the 14th day of May, 1867, in pursuance of a legal, written notice, duly published according to law not less than ten days previously, a legal special meeting of the legal voters of the said town of Milford was held at the usual place of holding elections in said town, and that said meeting being duly organized said voters proceeded to cast their votes, by ballot, for and against the proposition to levy and collect a tax of twenty thousand two hundred and fifty dollars ($20,250) upon the taxable property of the inhabitants of said town to aid in the construction of said railroad. And your orator saith that the votes so cast being duly canvassed and counted it appeared that one hundred and fifty-eight of them were in favor of such tax and fifteen of them were against it, and that thereupon the proposition to levy and collect such tax was duly declared carried and the proceedings at and relating to said meeting and said vote were duly attested by the town clerk of said town and by the moderator of said meeting and, as so attested, were by said town clerk duly recorded on the records of said town.

And your orator further showeth that, on the 16th day of July, 1868, the said town of Milford, at a special town meeting legally convened and held, recognized and affirmed the validity of the appropriation made by the vote above recited and it obligation to pay the same by voting an additional appropriation of four thousand five hundred ($4,500) dollars to the said railroad company for the same purpose, which vote was also duly attested and entered upon the records of said town.

And your orator saith that by the enactments of the Legislature of Illinois, above cited, said voters were empowered to bind the said town of Milford by said votes, and that said town thereby, then and there, became bound to levy and collect the taxes so voted, as soon as said road should be laid out and constructed through said town, and also bound therewith to pay over to the said railroad company the said sum of twenty thousand thousand two hundred and fifty ($250,250) dollars, so appropriated by said town to said company under the authority of the said enactments.

And your orator saith that the said appropriation so made was, at or about the time of making the same, entered and recorded by the supervisor of said town upon a book kept for that purpose by the said railroad company to the intent that the said company should have due knowledge and evidence of such appropriation and be bound on its part to fulfil the conditions upon which such appropriation was made.

And your orator further saith that the vote and proceedings aforesaid and the said record thereof constituted a valid, legal contract in writing, whereby, upon fulfillment by said company of the con-

ditions thereof, said town was bound to pay said appropriation to said company and to levy and collect such taxes and to make such provisions as were necessary and proper for the prompt payment of the same, as authorized and required by the said act passed March 7, 1867, above referred to.

Your orator saith that the said railroad company had full knowledge of the said proceedings, votes, and appropriation, and of the conditions thereof, assented thereto and complied with the conditions prescribed in said act of March 7, 1867, and with the conditions prescribed or implied in said vote, and relying on said appropriations and on the good faith of said town of Milford in keeping its obligations under said vote, on or about the — day of July, 1871, had laid, constructed, and completed its railroad through the said town of Milford; and your orator avers that so the said conditional contract, making the said appropriations of $20,250 became an absolute contract on the part of said town, whereby said town became bound to levy and collect such taxes and to make such provisions as were necessary and proper for the prompt payment of the said appropriation, according to the true intent and meaning of the said act of March 7, 1867, and of the said vote passed under the authority thereof.

And your orator further showeth to your honors that subsequently to the passage of the said act of March 7, 1867, and before the
6 laying and construction of the said railroad track by the said railroad company, to wit, on the 26th day of February, 1869, for the purpose of confirming and legalizing appropriations to said company, made by municipal corporations under the authority of the act of March 7, 1867, before named, and for the purpose of enabling such corporations the better to pay such appropriations, the Legislature of Illinois passed another act, entitled "An act to legalize certain aids heretofore voted and granted, to aid in the construction of the Chicago, Danville & Vincennes railroad," approved February 26, 1869, to which act, as published in the Private Laws of Illinois for 1869, volume 3, page 355, reference may be had; and also that, on the 24th day of March, 1869, the said Legislature, for the like purpose, passed another act entitled "An act to enable towns, townships, cities, or counties along the line of the Chicago, Danville & Vincennes railroad to contribute toward the construction of said railroad," approved March 24, 1869, to which act, as recorded in the Private Laws of Illinois for 1869, volume 3, page 356, reference may be had.

And your orator saith that the said railroad company, relying on the provisions of the act of March 7, 1867, and upon the vote and acts of the said town of Milford and of its authorities, officers, and agents under the same, and also relying upon the said acts passed in 1869, accepted the conditions of the said appropriation made to it by said town of Milford, and, on the faith thereof, laid, constructed, and completed its track through said town.

And your orator further showeth that on the 30th day of March, 1871, the said railroad company, relying on the said appropriation and on the good faith of the town of Milford in voting and paying

the same, had located its railroad through said town and was proceeding to construct the same, and that said town, not being able to pay said appropriation of $20,250 in money as soon as said construction through said town should be complete, by its town clerk and supervisor, executed its twenty-one bonds, dated March 30th, 1871, numbered from No. 1 to No. 21, inclusive, each for the sum of one thousand dollars, except No. 21, which was for the sum of six hundred seventeen $\frac{1}{100}$ dollars, all payable July 1st; No. 1 to No. 5, in 1876; No. 6 to No. 8, in 1877; No. 9 to No. 11, in 1878; No. 12 to No. 1,4 in 1879; No. 15 to No. 17, in 1880; No. 18 to No. 21, in 1881; all bearing interest at the rate of ten per cent. per annum, then a legal rate in Illinois, payable on the first day of July in each year, as per coupons thereto attached, a copy of one of which bonds and of one interest coupon, with a copy of the certificate of registry in the office of the auditor of Illinois endorsed on the bond, is hereto annexed, marked Exhibit A, and made part of this bill.

And your orator saith that, on the completion of the said railroad through the said town of Milford, and not long after their date,
7 to wit, on or about the — day of ——, 1871, the said town, through its authorized agents and officers, delivered said bonds to said railroad company, as representing the said appropriation of $20,250, and as good and valid securities therefor; and your orator further saith that the said town of Milford has repeatedly recognized and affirmed the validity of said bonds and of the appropriation, which they were intended to represent, by paying the interest annually accruing thereon, down to and including the interest thereon due July 1st, 1876, and by voting, levying, and collecting taxes therefor.

And your orator saith that the said Chicago, Danville & Vincennes Railroad Company, no part of said appropriation having been paid, accepted said bonds in good faith as evidence of the debt incurred by said town of Milford by voting in favor of said appropriation, and also, believing that the said bonds represented said debt, so modified that it was payable in time and with interest according to the apparent tenor and effect of the said bonds, and also accepted said bonds as negotiable securities duly authorized by said town of Milford, constituting, in themselves, legal choses in action against said town in the hands of the bearer or of any person or persons to whom they should have been transferred in good faith, either by indorsement or delivery.

And so believing, the said railroad company, on or about the — day of ——, 1871, put the said bonds upon the market for sale in order to raise the money necessary for the payment of the appropriation made to it by the said town of Milford, believing that the purchasers of said bonds would by the purchase of the same be substituted to all their rights of action against said town by reason of the premises, according to the tenor and effect of said bonds, as good and valid negotiable instruments, and that if for any cause said bonds should prove not to be valid as negotiable instruments, constituting in themselves good causes of action, that they were, at least, evidences of debt, entitling the purchasers and holders thereof

to recover of said town of Milford the several amounts named in them, with the lawful interest thereon, according to their tenor, and so believing said railroad company, by means of their agents, servants, or assigns, sold the said bonds in the market.

And your orator saith that on or about the 1st day of ——, 1871, your orator, in like manner believing that said bonds were evidences of debt against said town, representing said appropriation, and were good and valid negotiable instruments, entitling the holder to recover of said town the moneys therein specified, according to the apparent tenor and effect of said bonds, purchased the same in the market and paid therefor the sum of twenty thousand ($20,000) dollars, which moneys came to the use of the said railroad company, or of its assigns, in satisfaction of all claims which said company, or its assigns, had against the said town by reason of said appropri-
8 ations or of said bonds to the extent represented or intended to be represented by said bonds and as the consideration of the assignment of such claims to your orator.

And your orator saith that the intent and purpose of the said railroad company, its agents, servants, or assigns, in selling and delivering to your orator the said bonds, and in receiving the said money therefor, was to subrogate your orator to all rights which said company had against the said town of Milford by reason of said bonds or by reason of the said appropriation to the extent represented or intended to be represented by said bonds, and that the intent and purpose of your orator in purchasing said bonds and paying its money therefor was to acquire such rights and to be subrogated thereto.

And your orator avers that by reason of the facts herein alleged your orator was, in equity, subrogated to said rights, and is entitled to enforce the same against said town of Milford by exhibiting this its bill in equity against said town to this honorable court, and that said town, by its acts and votes herein recited, and by paying to your orator the interest on said bonds, and levying and collecting taxes therefor, admitted the subrogation of your orator to such rights and the title of your orator to enforce such rights against said town, and is forever estopped from denying the same.

And your orator further saith that up to the first day of July, 1876, to which date the said town paid the interest on said bonds, your orator had no knowledge, information, or belief that said town claimed that said bonds or that said appropriation were not legal and valid and binding on said town.

And now your orator showeth to your honors that on or about the 26th day of June, 1876, the said town of Milford then in the full enjoyment of the benefits of said appropriation, having received the full consideration therefor, notwithstanding its acts and votes aforesaid, exhibited its bill in equity to the judges of the honorable circuit court for the county of Iroquois aforesaid against your orator as the holder of said bonds, so called, and against certain other persons whom it is not material to name, alleging, in substance, the making and issuing of said bonds, as herein stated, that the same were delivered to your orator, that your orator

was the holder thereof, and that the same were made and issued without authority of law and were invalid, and praying the court so to decree and to enjoin your orator from collecting the same and for other relief, as by the record in the cause, upon reference thereto, will fully appear.

The circuit court, to which said bill was exhibited, dismissed the same, and thereupon the said town appealed from the decree
9 of dismissal to the honorable the supreme court for the northern grand division of Illinois, the court of highest and ultimate jurisdiction in said State, which court, at a term thereof holden on the 12th day of September, 1876, reversed said decree, held that said bonds were void as issued without authority of law, and remanded the cause to the said circuit court for further proceedings. Whereupon the said circuit court passed a decree in conformity with the opinion of the said supreme court, adjudging the said bonds void, as having been made and issued without authority of law, and enjoined your orator from collecting the same.

For the better information of your honors your orator refers to the bill and decree in said cause, and also refers to the opinion of the said Supreme Court in the Town of Middleport *vs.* The Ætna Life Insurance Company and others, reported in the Reports of Legal Decisions for the State of Illinois, volume 82.

Your orator saith that while the said supreme court held and the said circuit court adjudged that the said bonds were made and issued without authority of law, and that, therefore, no action could be sustained on them as negotiable instruments in the hands of *bona fide* holders for value, neither of said courts held or adjudged that the said appropriation of money, voted by the said town of Milford to said railroad company was not good and valid in law and did not constitute a good cause of action, which said company and your orator, subrogated to the rights of said company, could enforce against said town of Milford.

Your orator submits to your honors that, on the contrary, said courts impliedly admit the validity of said appropriations, since they limit their opinion and judgment to the question of the validity of the bonds, and merely decide that as such they were issued without authority of law, so that neither the said railroad company nor any person claiming through them could maintain an action on them. The said bill contained allegations to the effect that said appropriation was void because the said railroad company had not completed its road before the time when the provisions of the constitution of Illinois prohibiting such appropriation went into effect; but said courts did not so decide, but simply decided that the bonds were void as made, and issued without authority of law.

Your orator avers that by the issue and delivery of said bonds to the said railroad company, ratified and confirmed as herein recited, and by the acceptance of said bonds by said railroad company, the obligation incurred by the town of Milford, in making said appropriation was so modified that said appropriation, instead of being payable upon the completion of said road through the town, became payable in time, with interest, as provided in said bonds; and

10 your orator avers that the said bonds were and are evidences of debt, so payable, and your orator saith that, although said courts decided that said bonds as bonds, constituting in themselves causes of action, were void, as having been made and issued without authority of law, they did not decide that they were not legal evidences of debt, payable with interest as therein specified.

And your orator, upon information and belief, saith that the said town of Milford, pretends, and will claim before the court upon the trial of this cause, that by said decree of the circuit court of Iroquois county, all the matters herein alleged as constituting rights of action against it have been adjudicated so that your orator is estopped from asserting them again, but your orator alleges and shows to your honors that such pretence is unfounded, and that all such matters remain open and unaffected by said decree, as by the said decree the bill of complaint in the cause, on record in said court, and the opinion of the Supreme Court of Illinois, herein before cited, reference thereunto being had, will fully appear.

And your orator avers that by the issue, delivery, and acceptance of said bonds in manner aforesaid the obligation incurred by said town of Milford in making said appropriation was so modified that said appropriation, instead of being payable on the completion of said road through the town, became payable on time, with interest, in manner specified in said bonds, and further saith that if it was not so modified that then in that case said appropriation remained unaffected and unimpaired by reason of said bonds, so that said company had the right to recover the same of said town, such issue, delivery, and acceptance, notwithstanding, together with lawful interest for the detention thereof, and your orator saith that in either case your orator, by reason of the facts herein alleged, was subrogated to all the rights which the said railroad company had against the said town of Milford.

And your orator further saith that no part of the principal sum named in said bonds and no part of said appropriation has ever been paid, but that, on the contrary, the said town of Milford, whose duty it is to pay the same, denies all liability therefor, and unjustly detains from your orator the moneys due thereon; and your orator avers that by reason of such unjust detention the said town is liable in law and in equity to pay interest as damages for such unjust detention.

Ever since the purchase of said bonds as aforesaid your orator has continued to hold and now holds the same, and has been and now is the holder of all the rights which the said railroad company or its assigns had against the said towns, byreason of the premises.

Your orator therefore prays your honors by proper orders
11 and decrees to declare your orator subrogated to all the rights of said railroad company or of its assigns, against said town by reason of the premises to ascertain the amount due to your orator by reason of the facts herein alleged and the interest which has thereon accrued, either as interest or as damages for the delay of payment, and to adjudge and decree that the town of Milford shall pay to your orator the amount so

found due, and the interest thereon, and shall without delay levy and collect all taxes necessary for such payment, together with the costs of this proceeding, and in ascertaining the amount due, in case your honors shall be of opinion that the obligation incurred by said appropriations were modified by the issue, delivery, and acceptance of said bonds as herein alleged, then and in that case to find that said amount is the principal sum of twenty thousand six hundred seventeen $\frac{15}{100}$ ($20,617.15) dollars named in said bonds, and the interest thereon, according to the tenor of said bonds, less the interest paid as aforesaid up to July 1, 1876; but in case your honors shall be of opinion that said obligation was not so modified, then and in that case to find that the amount which the said town of Milford shall pay to your orator is the amount of said appropriation, to wit, the sum of twenty thousand two hundred and fifty ($20,250) dollars, and the lawful interest thereon for the detention of the debt.

And your orator prays your honors to enforce the rights of your orator in the premises by writs of mandamus and by such other and further orders and decrees according to the course of equity as shall be necessary and proper to afford the relief herein prayed for, and to grant such other and further relief as shall be equitable, just, and proper, together with the costs of this proceeding.

Your orator saith, upon information and belief, that some time after your orator purchased said bonds and became subrogated to the rights of the said Chicago, Danville & Vincennes Railroad Company, as herein alleged, but at what precise time your orator does not know, the said company became insolvent, and was by this honorable court placed in the hands of a receiver, to wit, W. H. Leyford, of ——, and your orator asks permission of this court to make said receiver as such also a party defendant hereto.

May it please your honors, the premises considered, to grant to your orator a writ of subpœna issuing out of this honorable court and under its seal, directed to the said town of Milford and to the said Chicago, Danville & Vincennes Railroad Company, also defendants herein, commanding them to appear and answer to this bill of complaint.

To the end, therefore, that the said town of Milford may, if it can, show why your orator should not have the relief herein
12 prayed for, your orator prays that the said defendant may full, distinct, and perfect answers make to all and singular the allegations in this bill contained, either admitting or denying the same, but not under oath, your orator hereby expressly waiving such oath, as by the rules of the court permitted, and that the other defendants may make such answers as they shall be advised to make.

THE ÆTNA LIFE INSURANCE COMPANY,
By its solicitors, BAILEY & SEDGWICK.

FRANCIS FELLOWES, *Of Counsel.*

13 EXHIBIT A.

UNITED STATES OF AMERICA, *State of Illinois:*

Milford Township Railroad Bond.

No. —. $1,000.

Know all men by these presents that the township of Milford, in the county of Iroquois and State of Illinois, acknowledges itself to owe and be indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum of money the said township of Milford promises to pay to the bearer at the American Exchange National Bank in New York on the first day of July, in the year one thousand eight hundred and seventy-eight, with interest thereon at the rate of ten per centum per annum, which interest shall be payable yearly on the first day of July, in each year, at the American Exchange National Bank in New York, upon presentation and delivery of the warrants or coupons severally hereto annexed until the payment of the said principal sum.

This bond is issued under and by virtue of a law of the State of Illinois entitled "An act to authorize cities, towns, or townships lying within certain limits to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville & Vincennes railroad," approved March 7, 1867, and in accordance with the vote of the electors of said township, taken at a special town meeting held on the fourteenth day of May, A. D. 1867, and a certain other special town meeting held in and for said township on the sixteenth day of July, A. D. 1868, in accordance with said act; also under and by virtue of a law of said State entitled "An act to legalize certain aids heretofore voted and granted to aid in the construction of the Chicago, Danville & Vincennes railroad," approved February 26, 1869; and the faith of said township is hereby pledged for the payment of said principal sum and interest as aforesaid.

In witness whereof the supervisor and clerk of said township of Milford have subscribed this bond this thirtieth day of March, one thousand eight hundred and seventy-one.

J. F. WAGNER, *Supervisor.*

J. HALL, *Clerk.*

[Twenty-five cent revenue stamp on the bond.]

Milford Township Railroad Bond. Interest Warrant.

Amount. No.

On the first day of July, one thousand eight hundred and seventy-nine, the township of Milford, Iroquois county, State of Illinois, will pay to the bearer $—— at the American Exchange National Bank of New York, being one year's interest on bond numbered as above.

J. F. WAGNER, *Supervisor.*

J. HALL, *Clerk.*

AUDITOR'S OFFICE, ILLINOIS, SPRINGFIELD, *July* 26, 1871.

I, Charles E. Lippincott, auditor public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16, 1869.

In testimony whereof I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid,

C. E. LIPPINCOTT,
Auditor Public Accounts.

(Auditor's Office, Springfield.)

Endorsed: Filed May 27, 1886. Wm. H. Bradley, clerk.

14 On the same day, to wit: On the twenty-seventh day of May, 1886, there issued out of said clerk's office a writ of subpœna in said entitled cause, which said writ, together with the return of the marshal thereto attached, are in the words and figures following to wit:

Subpœna.

UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

The United States of America to the town of Milford, Iroquois county, Illinois, the Chicago, Danville and Vincennes Railroad Company, and W. H. Leyford, receiver of said railroad company, Greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois at Chicago, in said district, on the first Monday in the month of July next, to answer the bill of complaint of the Ætna Life Insurance Company, a corporation, &c., this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made; upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

15 Witness, the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six, and of our independence the 110th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Memorandum.

The above named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court at Chicago aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

Marshal's Return.

I have duly served the annexed writ in the following manner, to wit:

Upon the town of Milford, Iroquois county, Illinois, by personally delivering a true copy thereof, to Alba Jones, supervisor of said town, on the eight- day of June, A. D. 1886.

I also served the same upon the Chicago, Danville and Vincennes Railroad Company therein named, by personally delivering to Joseph O. Rutter, a director of said company, a true copy thereof on the eleventh day of June, A. D. 1886.

16 I also served the same upon W. H. Leyford, receiver of the Chicago, Danville & Vincennes Railroad Company, by personally delivering to him a true copy thereof on the 7th day of June, 1886.

FREDERICK H. MARSH,
U. S. Marshal.
By WILL H. DUTCHER, *Deputy.*

Endorsed: Filed June 12, A. D. 1886. Wm. H. Bradley, clerk.

17 Afterwards, to wit, on the seventh day of July, 1886, came the Town of Milford, by its solicitor, and filed in said clerk's office its demurrer to the bill in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer.

In United States Circuit Court, Northern District of Illinois. July Term, 1886.

The demurrer of the Town of Milford to the bill of complaint of the Ætna Life Insurance Company against the Town of Milford and others.

This respondent, by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint contained to be true in manner and form as therein set forth, doth demur to said bill, and for cause thereof shows—

That said bill does not contain any matter of equity whereon this court can ground any decree or give complainant any relief as against this respondent.

Second. It appears by said bill that the same is exhibited against respondent and the Chicago, Danville and Vincennes Railroad Company and William Lyford, its receiver, as respondents thereto, and the facts set forth in said bill show that the same relief cannot be granted against all of said respondents, and said bill fails

18 to state such facts as show said respondents are all jointly liable, but the facts stated show that this respondent, if liable in any manner, is not liable jointly or in any way connected with the others, and said bill is multifarious.

Third. That said bill fails to show or set forth any written agree-

ment on which suit is brought that would in any way bind this respondent, and fails to show that any cause of action exists against this respondent that arose within five years last past before the bringing of this suit.

Fourth. Said bill fails to show and set forth any written agreement on which suit is brought that would in any way bind respondent on which has arisen a cause of action within the last ten years prior to bringing said suit.

Fifth. Said bill set forth facts that show great laches on part of complainant, and such laches that a court of equity will not relieve against unless facts are shown causing the delay, which are entirely wanting in this bill.

Sixth. Said bill contains many blanks of dates and names and nothing from which you can ascertain what said blanks mean.

Wherefore and for other good causes of demurrer appearing in said bill this respondent doth demur thereto and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to said bill, and prays to be hence
19 dismissed with its costs and charges in this behalf most wrongfully sustained.

TOWN OF MILFORD,
By ROBERT DOYLE,
Its Solicitor.

I certify that, in my opinion, the foregoing demurrer of the Town of Milford to the bill of complaint of the Ætna Life Insurance Company, complainant, is well founded in law and proper to be filed in the above cause.

ROBERT DOYLE,
Sol. for Town of Milford.

UNITED STATES OF AMERICA,
Northern District of Illinois, Iroquois County, } ss:

Alba Jones, supervisor of the town of Milford, one of the respondents, on oath states that he has heard read the foregoing demurrer to the bill of complaint of the Ætna Life Insurance Company in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

A. M. JONES.

Subscribed and sworn to before me, a notary public of Iroquois Co., Ill., by Alba Jones, supervisor of town of Milford, this 6th day of July, A. D. 1886.

[SEAL.]

W. F. PIERSON,
Notary Public.

Endorsed: Filed July 7, 1886. Wm. H. Bradley, clerk.

20 Afterwards, to wit, on the thirteenth day of June, 1887, there was filed in said clerk's office a stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

In the United States Circuit Court, Northern District of Illinois.
May Term, A. D. 1887.

THE ÆTNA LIFE INSURANCE COMPANY
vs.
THE TOWN OF MILFORD *et al.* } Bill in Equity.

THE ÆTNA LIFE INSURANCE COMPANY
vs.
THE TOWN OF MIDDLEPORT, *et al.* } Bill in Equity.

THE ÆTNA LIFE INSURANCE COMPANY
vs.
THE TOWN OF BELMONT *et al.* } Bill in Equity.

It is hereby stipulated that the decision of the demurrers to complainants' bills in said cases is submitted to the court on the following printed briefs, the court, or any presiding judge therein to take the cases an said demurrers on:

1st. Briefs of Robert Doyle, solicitor for said towns.

2nd. Brief (same in each case) of Bailey & Sedgwick, solicitors for said complainant.

21 3rd. Argument (same in each case) of Francis Fellows, of counsel for complainant.

4th. Brief in reply of Robert Doyle to said briefs and arguments of Bailey & Sedgewick and Francis Fellows; same in each case.

5th. Note of Bailey & Sedgwick on new citations in said brief in reply.

The judge deciding is requested to notify counsel so they may be present at decision and take such steps thereupon as they may deem prudent and as are proper in each case as to answering or abiding by demurrers or amending bills or appealing.

ROBERT DOYLE,
Sol. for Towns.
BAILEY & SEDGWICK,
Sol'rs for Comp'ts.

Endorsed: Filed June 13, 1887. Wm. H. Bradley, clerk.

22 On the same day, to wit, on the thirteenth day of June, in the adjourned May term of said court, 1887, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

ÆTNA LIFE INSURANCE COMPANY
vs.
TOWN OF MILFORD *et al.* } In Chancery.

It appearing to the court that the defendant, Chicago, Danville and Vincennes Railroad Company has been served with process,

but has not appeared herein, and it being now three times solemnly called in open court to appear and plead, answer, or demur to the complainant's bill, comes not, but makes default, it is thereupon ordered that its default be entered and that said bill be taken as confessed and true as against said defendant company.

And now come the parties, by their solicitors, and the demurrer of the Town of Milford is submitted to the court under stipulation this day filed and upon briefs, and by the court taken under advisement.

23 Afterwards, to wit, on the fifth day of July, in the July term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Decree.

ÆTNA LIFE INSURANCE COMPANY
vs.
TOWN OF MILFORD *et al.* } In Chancery.

Now again come the parties, by their solicitors, and the court having considered the demurrer of the town of Milford to the bill herein, sustains the same. It is thereupon ordered and adjudged that said bill be dismissed for want of equity at complainant's costs and thatexecution issue therefor.

24 Afterwards, to wit, on the seventh day of July, 1887, came the complainant, by its solicitors, and filed in said clerk's office its motion for appeal in said entitled cause, which said motion for appeal is in the words and figures following, to wit:

Motion for Appeal.

In the Circuit Court of the United States, Northern District of Illinois. July Term, A. D. 1887.

THE ÆTNA LIFE INSURANCE COMPANY, Complainant,
vs.
THE TOWN OF MELFORD *et al.*, Defendants.

Bill in equity.

Now comes said complainant and prays said court for an appeal from its final order and decree of July 5th, 1887, sustaining the demurrer of said town to said bill and dismissing said case, and asks the court for sixty days or such reasonable time as the court may allow within which to present its appeal bond in its said appeal to the Supreme Court of the United States.

BAILEY & SEDGWICK,
Complainant's Solicitors.

Endorsed: Filed July 7, 1887. Wm. H. Bradley, clerk.

25 On the same day, to wit, on the seventh day of July, in the July term of said court, 1887, in the record of the proceedings

thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

ÆTNA LIFE INSURANCE COMPANY
vs.
TOWN OF MILFORD *et al.*
} In Chancery.

Now comes the complainant, by its solicitor, and prays an appeal from the decree of dismissal herein to the Supreme Court of the United States, which is allowed upon said complainants giving bond, according to law, in the penal sum of five hundred dollars, with surety, to be approved by the clerk.

26 Afterwards, to wit, on the twenty-second day of July, 1887, there was filed in said clerk's office an appeal bond in said entitled cause, which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that the Ætna Life Insurance Company, of Hartford, Connecticut, and Jas. H. Sedgwick & O. J. Bailey, sureties, are held and firmly bound in the penal sum of five hundred dollars, good and lawful money of the United States, to the town of Milford, in the county of Iroquois and State of Illinois, and the Chicago, Danville & Vincennes Railroad Compy, their successors, assigns, and legal representatives, for the payment of which well and truly to be made, said obligors hereby bind themselves, their heirs, executors, administrators, and successors jointly, severally, and firmly by these presents.

Witness the hands and seals of said obligors this 18th day of July, A. D. 1887.

The condition of this obligation is such that whereas in the circuit court of the United States for the northern district of Illinois, at the July, 1887, term thereof, to wit, July 5th, 1887, said obligees obtained a judgment and decree against said obligor, The Ætna Life Insurance Company in a certain case in equity then and therein
27 pending, in which said obligor was complainant and said obligees defendants, upon demurrer by said towns to said complainant's bill therein, sustaining said demurrer and dismissing said bill of complaint, at complainant's costs, from which judgment and decree said complainant has taken an appeal to the Supreme Court of the United States. Now if said appellant shall prosecute its said appeal to effect, or if it fail to make its plea good, shall answer all damages and costs therein, then this obligation to be void; otherwise to remain in full force and effect.

[SEAL.] JOHN C. WEBSTER, *Vice-President.* [SEAL.]
JAS. H. SEDGWICK, *Surety.* [SEAL.]
O. J. BAILEY, *Surety.* [SEAL.]

Approved:
WM. H. BRADLEY, *Clerk.*

Endorsed: Filed July 22d, 1887. Wm. H. Bradley, clerk.

28 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein The Ætna Life Insurance Company is the complainant and The Town of Milford and The Chicago, Danville and Vincennes Railroad Company are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in Chicago, in said district, this twelfth day of September, 1887.

[Seal of Circuit Court U. S., Northern Dist. Illinois. 1855.]

WM. H. BRADLEY, *Clerk.*

Endorsed on cover: N. Illinois, C. C. U. S. No. 1136. The Ætna Life Insurance Company of Hartford, Connecticut, appellant, *vs.* The Town of Milford. Filed October 8, 1887.

12

124-534-554

OCT 22 1887
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE ÆTNA LIFE INS. CO. vs. THE TOWN OF MIDDLEPORT, *et al.* — *No. 1,134. Appeal from U. S. Circuit Court, Northern District of Illinois.*

THE ÆTNA LIFE INS. CO. vs. TOWN OF BELMONT, *et al.* — *No. 1,135. Appeal from U. S. Circuit Court, Northern District of Illinois.*

THE ÆTNA LIFE INS. CO. vs. TOWN OF MILFOD, *et al.* — *No. 1,136. Appeal from U. S. Circuit Court, Northern District of Illinois.*

BRIEF AND ARGUMENT OF J. H. SEDGWICK AND O. J. BAILEY, *Counsel for Appellant.*

PEORIA, ILL.:
TRANSCRIPT PUBLISHING CO., PRINTERS,
1887.

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Supreme Court of the United States.

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THE ÆTNA LIFE INS. CO. vs. TOWN OF BELMONT, *et al.* — *No. 1,135. Appeal from U. S. Circuit Court, Northern District of Illinois.*

BRIEF AND ARGUMENT OF J. H. SEDGWICK AND O. J. BAILEY, *Counsel for Appellant.*

STATEMENT.

There is no substantial difference in these cases. What is said of one is applicable to all, unless a distinction is indicated. The court below sustained the demurrers of the defendant towns to appellant's bills of complaint, and

dismissed the bills for want of equity. The statement of complainant's case is contained at large in its bills in the record, to which it respectfully refers. Take that in the Middleport case for example.

It states, in substance, that at an election of the legal voters of the defendant town, held June 8th, 1867, it was voted, by ballot, to levy and collect a tax of $15,000 upon the taxable property of the inhabitants of the town, to aid in the construction of the Chicago, Danville & Vincennes Railroad. That the proceedings, duly attested by the town clerk and the moderator of the town meeting, were thereupon duly recorded by said town clerk upon the records of said town. That the power to bind said town by such vote was conferred in an act of the legislature of Illinois, approved March 7th, 1867, entitled "An act to authorize cities, towns or townships, lying within certain limits, to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville & Vincennes Railroad." For said Act see Vol. 1, p. 842 Private Laws Illinois, 1867. So much thereof as is deemed necessary to the decision of this case, is as follows:

"SECTION 1. All incorporated towns and cities, and townships acting under the township organization law, which lie wholly or partly within twenty miles of the east line of this state, and also between the city of Chicago and the southern boundary of Lawrence county, be and the same are hereby severally authorized to appropriate such sum of money as they may deem proper to the Chicago, Danville & Vincennes Railroad company, to aid in the construction

of the road of said company, to be paid to said company as soon as the track of said road shall have been located and constructed through said city, town or township respectively; *provided*, however, that the proposition to appropriate money to said company shall be first submitted to a vote of the legal voters of said respective townships, towns or cities, at a regular annual or special meeting, by giving at least ten days' notice thereof; and a vote shall be taken thereon by ballot at the usual place of election; and if the majority of votes cast shall be in favor of the appropriation, then the same shall be made, otherwise not.

"SEC. 2. The authorities of said townships, towns or cities respectively are hereby authorized and required to levy and collect a tax and make such provisions as may be necessary and proper for the prompt payment of the appropriations under the provisions of this law."

The laws of 1869, hereafter referred to, are, so far a pertinent to this case, as follows:

Private Laws of Illinois 1869, vol. 3, p. 355.

"An act to legalize certain aids heretofore voted and granted to aid in the construction of the Chicago, Danville & Vincennes Railroad, in force February 6, 1869.

"SEC. 1. Be it enacted, etc., That the taxes, aids and appropriations heretofore voted by towns, townships or cities along the proposed route of the Chicago, Danville & Vincennes Railroad, or in the vicinity of said railroad, be and the same are hereby legalized, ratified and confirmed.

* * *

"SEC. 2. Said towns, townships or cities shall be liable to pay said donations, aids or appropriations, upon the terms and conditions by them voted, whenever said railroad shall he completed into or opposite to said towns, townships or cities, as the case may be.

"SEC. 3. For the purpose of facilitating the payment of the said aids, contributions or appropriations, when the time of payment shall arrive, as hereintofore provided, the proper authorities of said towns, cities or townships are authorized and required to levy and collect a sufficient per cent. to meet and liquidate said aids, contributions or appropriations, or said towns, cities or townships may borrow money and issue bonds therefor for the purpose of paying said aids." * * *

Private Laws of Illinois 1869, vol. 3, p. 350.

" An Act to enable towns, townships, cities or counties along the line of the Chicago, Danville & Vincennes Railroad to contribute toward the construction of said railroad. In force March 24th, 1869.

"SEC. 4. The authorities of any township, town or city—such township, town or city having voted to contribute aid in the construction of said railroad—may borrow money to promptly meet such contribution, and issue bonds of such township, town or city, * * * and shall have power to levy and collect such taxes as may be necessary to pay accruing interest, or pay the principal sum."

"SEC. 8. All aids, contributions or appropriations heretofore voted or ordered in the counties of * * Iroquois, either of townships, towns, cities or counties, are hereby

ratified and confirmed upon the terms and conditions by them or each of them so voted or ordered. * * *

The bill further avers that said vote, and the proceedings connected therewith, and the record thereof in the records of the town, constituted a valid legal contract in writing, then and there binding upon the town, whereby, upon fulfillment by said railroad company of the conditions thereof, the town was bound to pay such appropriation to said company, and levy and collect the necessary taxes therefor on its taxable property; that is, when the railroad was laid out and constructed through the town, as provided for in the conditions of the vote. That the railroad assented thereto, complied with said conditions, and constructed its road in July, 1871; and therefore said conditional contract of the town became absolute. That to further confirm and legalize the same, the legislature of Illinois, in 1869, passed the two other acts above cited, contained in Private Laws for that year, vol. 3, pp 355, 356. And the bill recites further acts of record by said town recognizing the binding force of said contract, and its payment of interest until and including July, 1876, on the bonds issued to fund the same. That said bonds were issued by the supervisor and town clerk of said town, thereto instructed by the board of auditors, and other township authorities and voters, varying a little in the several cases, under supposed authority contained in said acts of the legislature, and were delivered to said company on the completion of its road, as above, and by it received, in good faith, and in like manner, and like good faith, sold to and bought by complainant for $14,700 cash in the Middleport case; in the others for like substantial sums. That

the complainant thereby became the equitable assignee of the contract by the town with the railroad company to levy and collect for its benefit said appropriation of $15,000 in the Middleport case, other sums in the other cases, sufficient to give jurisdiction.

It is to enforce this equity, and be subrogated to the rights of the railroad company in and to that contract, that the bill is brought in this case. For it goes on to show: That the bonds, as interest-bearing, negotiable instruments, were afterwards, Sept. term, 1876, declared invalid by the Supreme Court of Illinois, in *Ætna Life Ins. Co.* v. *The Town of Middleport*, 82 Ill., p. 562, though the appropriation of the $15,000.00 was conceded to be a valid one.

The railroad company was made a party defendant to the bill, and defaulted.

The town, (in the Belmont case the towns) demurred, setting forth special causes:

1. Want of equity on face of bill.

2. Multifariousness.

3 No written agreement by town; five year statute of limitation.

4. No written agreement by town; ten year statute of limitatiou.

5. Laches of complainant.

6. Unfilled blanks in bill.

This demurrer being submitted to the court below upon brief of counsel, the court, Blodgett, judge, delivered an opinion sustaining the demurrer for the 3d cause above, five year statute of limitation, and dismissed the bill for want of equity. This presents the question whether the vote by ballot of the electors of the town, duly assembled in town meeting pursuant to law, with authority of law to bind the town, voting an appropriation to a railroad company, upon condition of the location of the road through the town and making a village therein a point thereon, the vote with its conditions and the proceedings in connection therewith being entered of record in the public records of the town pursuant to law, is a contract in writing in favor of the railroad company, which, when in due time accepted and complied with by the company, as shown by the same records, might be the foundation of an action by the company against the town within sixteen years thereafter, under the following statute of limitations, in force in Illinois when the vote was taken.

" All actions founded upon any promissory note, simple contract in writing, bond, *judgment or other evidence of indebtedness in writing*, made, *caused* or *entered into* after the passage of this act, shall be commenced within sixteen years after the cause of action accrued, and not thereafter." Special laws Illinois, 1849, p. 44, Sec. 1.

If, as we contend, the above statute of limitations, if any, is to govern, then the court below committed error; the demurrer should have been overruled. Since the road was completed through the town in July, 1871. Then, first, the cause of action against the town on the vote, accrued in favor of the railroad company. The action was com-

menced in May, 1886, less than sixteen years after its cause accrued. There is no ten year limitation that can affect it, since, when this cause of action accrued there was no ten year limitation law in force in Illinois. Such a law was first in force July 1, 1872, and by its terms is not applicable to a cause of action prior thereto.

But if the second section of the first above quoted limitation act is to govern, which reads as follows: "All actions founded upon accounts, bills of exchange, orders, or upon promises not in writing, express or implied, made after the passage of this act, shall be commenced within five years next after the cause of action shall have accrued, and not thereafter," then we cannot claim to have commenced the action within five years, the court below was right, and committed no error in dismissing the bill.

ASSIGNMENT OF ERRORS.

We assign for error in the decree of the court below, in each case:

1st. The sustaining of the demurrer of defendent town to complainant's bill and the dismissing the bill.

2d. The judgment of the court below that the cause of action stated in complainant's bill is founded upon a promise not in writing, instead of being founded upon evidence of indebtedness in writing, the consequent finding by said court that said cause of action was barred at the time of the commencement of this suit, and the dismissal of complainant's bill therefor.

BRIEF OF ARGUMENT.

The points of law to be discussed arise upon the statements of facts as contained in complainant's bill—pp. 3–13 of record; which sets forth:

1. The making and validity of the contracts between the town and the Railroad Company, and the evidencing the same of record; making an evidence of indebtedness in writing—pp. 3–6.

2. The proceedings concerning the issue of the bonds thereon—pp. 6–8.

3. The purchase of the bonds by complainant, and its consequent subrogation to the rights of the Railroad Company in the contract, to fund which they were given—pp. 8–9.

4. The proceedings in the Illinois Courts by which such bonds were declared void as negotiable instruments —pp. 9–10.

5. Deductions and prayers of bill—pp. 11–12.

6. Copy of bonds—p. 13.

The above paging applies to the Middleport record, (manuscript), from which the records in the Milford and Belmont cases vary little. We follow in this brief the course of the argument in the court below. It is desirable that this court should look over the whole ground, as did that; though we complain of the opinion of that court only upon the question of limitation.

In our case, that of Belmont, the town has been divided into two, viz.: Belmont and Grenard, since the aid was voted. See p. 6 of record in that case. But that does not affect the questions here discussed. The original town of Belmont voted June 10, 1867; p. 4 of that record. Milford voted May 14, 1867; p. 4 of record in that case.

In all the cases the road was constructed in accordance with the conditions of the vote in July, 1871; p. 5, Milford record; pp. 5 and 6 of Belmont record; p. 5 of Middleport record.

When the railroad was completed, as required in the votes, it was thought by the towns and the railroad company that the several acts of the legislature, before referred to, not only gave power to vote the aids but also to fund them and get more time on them by issuing interest bearing bonds thereon. This was accordingly done. They were issued to the company and by it sold to complainant for full value, in good faith; pp. 7, 8, 9 of the several records, showing amount paid by complainant in each case.

The towns paid interest to the complainant and they and their officers performed other acts concerning them, as set out in the bills, till the latter part of 1876, when they filed bills in chancery in the State Courts, against complainant, to have them declared void; and thereupon followed the decision in *Town of Middleport* v. *Ætna Life Ins. Co.*; 82 Ill., 562; pp. 9 and 10 of records.

We proceed with the argument.

1st. The validity of the contracts, as made by the votes of the towns, and our right to them in equity.

These contracts granting aid were completed, as binding obligations on the towns in favor of the railroad company, at the polls.

Chinquy v. *People*, 78 Ill., 576.
C. & I. R. R. Co v. *Pinkney*, 74 Ill., 277.
Fairfield v. *Gallatin Co.*, 100 U. S., 47.

The last case overrules *Town of Concord* v. *Savings Bank*, 92 U. S., 625.

The fact that there were conditions in the contract, as that the railroad should be built, etc., made it no less binding; as a bond is binding though there be conditions in it. This point we argued fully in the Fairfield case, and the decision in that case shows that the U. S. Supreme Court agrees with us.

The railroad company performed the conditions about July, 1871. This made the contracts absolute on the part of the town to levy, collect and pay over to the railroad company the taxes voted. These contracts have never been changed. "The constitution (of Illinois, 1870) saved whatever rights were acquired by the company under that vote; for it left untouched the authority of the township to complete the donation to the company according to the terms upon which it was voted."

Concord v. *Robinson*, 121 U. S., p. 171.

The issuing of void bonds by the officers of the town to represent or fund these contracts, and the acceptance of such bonds by the railroad company, and its negotiation of

them to holders for value, did not extinguish these valid obligations of the towns.

Marsh v. *Fulton Co.*, 10 Wall., 676.
Louisiana v. *Wood*, 102 U. S., 298.
Paul v. *City of Kenosha*, 22 Wis., 256.
Curtis v. *Levitt*, 15 N. Y., 1.
Nelson v. *Mayor*, 63 N. Y., 544.
Meyer v. *Mayor*, 63 N. Y.
Anthony v. *Jasper Co.* 101 U. S., 693.

But having sold the bonds and received the money on them it would be inequitable for the railroad company to still enforce the contracts for its own benefit. It therefore holds them as trustee for our benefit. By buying the bonds supposed to represent them we became in equity entitled to the benefit of them.

Wood v. *Louisiana*, 5 Dill., 124, affirmed in
Louisiana v. *Wood*, 102 U. S., 298.

A purchaser will ordinarily be subrogated to all the rights of his vendor in the property, even though they are not expressly conveyed to him.

Sheldon on Subrogation, Sec. 34.

2nd. Our right to enforce them in equity.

The *equitable assignee* of a *chose in action* has the right to go into a court of equity to have his interest therein established; and when so established he will have the right to complete relief in the same action by decree of specific performance of the contract.

Mechanics' Bank of Alexandria v. *Seton*, 1 Pet., 299.

Adams Equity, *80, (5th Am. Ed. p. 189).

Fortiscue v. *Barnett*, 3 M. & K., 36.

Ex parte Pye v. *Dubost*, 18 Ves., 140

In enforcing specific performance the Supreme Court of the United States regards the technical distinction, as to whether the contract relates to realty or personalty, much less than it does the other question; whether the plaintiff is entitled to other or better relief than the law can give him.

Parsons on Contracts (5th Ed), Vol. 3, p. 376.

2 Story Eq. Jur., Sec. 724.

As said in Mechanics' Bank of Alexandria case, *supra*, "Courts will only weigh personal property contracts with greater nicety than real estate ones. If the remedy at law is not clear and perfect, the court will decree specific performance."

Now our remedy at law to be subrogated to the rights of the railroad company on these contracts with the towns, is very far from being clear and perfect. The practice in Illinois, which in this case, being the ancient practice, is authority for our proceedure, requires us to go into equity for subrogation. Here courts of law know nothing of this relief and cannot administer it.

Meyer v. *Mintonye*, 106 Ill., 414.

This is the general rule wherever the jurisdictions are separate.

1 Story Eq. Pl., Secs. 635, 636, 637.

Springer's Admr. v. *Springer*, 43 Pa., 518.

Mosier's Appeal, 56 Pa., 76.

Eaton v. *Hasty*, 6 Neb., 419.

3 Pomroy Eq., Sec. 1419, note 1.

Even in those states where the law, following equity, has come to administer this relief more or less completely it appears that equity still retains its jurisdiction.

See Sheldon on Subrogation, Chap. 1,
Secs. 1, 4.

Indeed it is the rule that a United States court of equity will not be ousted of its ancient jurisdiction because the State courts of law come to apply equity principles more or less thoroughly.

Payne v. *Hook*, 7 Wall., 425.

At all events the Illinois case cited shows the proper practice here, and that we have followed it. Had we commenced at law we might have been demurred out of court under our law practice, which furnishes the rule for U. S. courts of law sitting in the State.

The cases at bar then belong to that class where the plaintiff has an independent equity, the right to subrogation. In such cases, *Hayward* v. *Andrews*, 106 U. S., 675, cited by counsel for the towns against us, is an authority in our favor; and recognizes and declares the right to go into equity for relief. *Louisiana* v. *Wood*, 102 U. S., 294, cited by said counsel as a case where Wood was subrogated at law, as to two of his bonds, purchased from a third party and not directly from the city, to such third party's rights against the city, on the original consideration, arose in a

code state and was tried under a code practice, where the distinction between legal and equitable relief is not clearly marked, and where courts of law may administer equitable relief and proceed more or less according to equity practice. Hence what we in Illinois should consider the anomaly of subrogation at law. In this State it would be impossible for a plaintiff to recover at law in his own name, as Wood did, on the consideration of those two bonds. This shows that in the matter of practice that case is no authorty in this State, and could not have intended to debar a United States court of equity from its ancient jurisdiction.

The case of *Litchfield* v. *Ballou*, 114 U. S., 190, which arose in this State, is no authority that the purchaser of void bonds can, under our practice, be subrogated at law to the rights of his vendor against the municipality. In that case Ballou seems to have been the original taker of the bonds from the city, and no question of subrogation arose. It was a bill in chancery to recover back the original consideration between the first parties to the transaction. It was based on the theory of a loan to the city. The court simply holds that the constitutional inhibition, of becoming indebted beyond a certain amount, applies to a loan as much as to a bond. This is undoubtedly the law but we fail to see how it can help defendants in this case.

If in the case at bar the action had been by the railroad company against the towns on their contracts it must have been at law, of course. But we have no *legal* title to those contracts. They never have been assigned to us. Had they been perhaps we might have brought an action at law on them against the towns in the name of the rail-

road company, or its receiver; though this is doubtful. But clearly now our remedy to get the benefit of those contracts is wholly and purely equitable.

Had these *choses in action* been actually assigned to us by the railroad company, our right to them would have rested in such contract of assignment. Now it rests on the *fact* that we bought certain bonds, supposed at the time to represent these contracts, but which afterwards turned out void. The equity of subrogation arises where plaintiff's right rests not upon contract, but upon a state of facts which give it. In such cases the proper remedy is not at law but in equity.

Mosier's Appeal, 56 Pa., 76.
Eaton v. *Hasty*, 6 Neb., 419.
Goldsmith v. *Stewart*, 45 Ark., 154.

We stand like a purchaser of land at execution sale which has turned out invalid. Such facts subrogate the purchase to the lien of the original judgment. *Mr. Haney* v. *Schenk*, 88 Ill. 357.

Morgan v. *Hammett*, 23 Wis. 30, illustrates the administration of this equity under the code. The purchaser at a void administrators' sale was subrogated to prior claims on the land satisfied by his money, "on principle of natural justice and equity," as the court says.

Under the Arkansas code the practice seems to be for the same court to have two dockets, law and chancery, and to remove cases from one to another on motion at any time. In *Talbot* v. *Wilkins*, 31 Ark., 421, subrogation had been permitted by the court below in a case on the law docket.

The Supreme Court said the practice was irregular. But they did not reverse on that account, as it was incumbent on plaintiff in error himself to have a suit asking subrogation removed to the equity docket.

3d. Mistake of Law or Fact.

But we are told that we have no right to this subrogation because in buying the bonds we made a mistake not of fact but of law, and are therefore chargeable with notice of the invalidity of the bonds. But how does this affect our rights to subrogation? "Circumstances may exist which will give the holder of bonds an equitable right to recover from the municipality the money which they represent, though he cannot enforce their payment or put them on the market as commercial paper."

Anthony v. *County of Jasper*, 101 U. S., 697.

This was said in a case where the bonds were held void because issued by a fraud which amounted to forgery, and the purchaser was held chargeable with notice of the fraud. If we were suing the railroad company on an implied warranty of the validity of the bonds, this question of implied notice of their invalidity might cut some figure. But what application to the case at bar can there be of *Ramsey* v. *Clinton Co.*, 92 Ill., 228, or *Litchfield* v. *Ballou*, 114 U. S., 192, cited by counsel for the towns? They were actions brought by the parties, who claimed that they had acted under mistake, directly against those to whom they had paid the money. No question of subrogation arose in either case. A purchaser at execution sale has no implied warranty of validity of title. If it turns out bad he

can sue no one therefore. Yet in equity, notwithstanding the notice of *caveat emptor* under which he purchased, he is subrogated to the lien of the original judgment. So implied notice of defects in the thing purchased has nothing to do with the purchaser's right to be subrogated to all that fairly and equitably should go with his purchase to recompense him, if it turns out a nullity. And whether the mistake of the purchaser is one of law or fact, he has the right to be subrogated to everything that equitably belongs with his purchase.

Gauze v. *City of Clacksville*, 5 Dill., 180.
Wood v. *Louisiana*, 5 Dill., 124.
Shirk v. *Pulaski Co.*, 4 Dill., 214.
School District v. *Lumbard*, 2 Dill., 493.

As *Wood* v. *Louisiana* was affirmed in the Supreme Court of the United States, the principle is there settled. The purchaser of void bonds, though chargeable with notice of their invalidity, is subrogated to the seller's rights on the consideration for which they were issued against the municipality issuing them.

But further: Whether the bonds were valid or not was, at the time of the purchase, a mixed question of law and fact. The laws on the statute book gave the clear right to vote the aids and issue the bonds. The Middleport bonds recite votes under all three acts, those of 1869 as well as that of 1867. Whether the supervisors and town clerks had, under such statutes, the power to issue the bonds without express authority so to do from the voters in town meeting assembled was, and is a question of

law. While in *Middleport* v. *Ætna*, p. 567, it is held that they had no such powers, the *Town of Douglas* v. *Niantic Sav. Bank*, 97 Ill., 232, holds that they have such powers. But however this may be, the question as to whether these officers had in fact, if necessary under the law, been expressly authorized by the voters to issue the bonds, was a question of fact. The people having voted the aid, the supervisors being the proper officers to decide whether the requirements authorizing the issue of bonds had been complied with, (See *People* v. *Cline*, 63 Ill., 395), and they issuing bonds reciting as these do that they were issued in accordance with the acts of the Legislature and the vote of the electors of the towns, we had the right to assume that all facts necessary to give the supervisors authority to issue the bonds had been complied with.

Pompton v. *Cooper Union*, 101 U. S., 196.

It is true that the Supreme Court of Illinois, *arquendo*, questions the constitutionality of the two later acts of 1869 so far as they give the right to issue bonds. But it says, "waiving this objection," yet the supervisors had no express authority from the voters to issue, etc. See pp. 566-7 of opinion. So with it the validity of the bonds was a mixed question of law and fact.

But again: The towns cannot complain that we are subrogated to the rights of the railroad company under these contracts; for we must bear in mind that in this case the liability of the town was *fixed* by the election, as held in *Chinquy* v. *People*, and *Fairfield* v. *Gallatin Co.*, *supra*. It is liable to somebody, either the railroad company or to us as

the equitable assignee or successor of that company. It makes no difference to the towns to which they are liable. We bring them and the company into a court of equity asking to have the liability declared and established in us by subrogation. If the railroad company makes no objection to this, certainly the towns cannot demur.

4th. Multifariousness.

And notwithstanding defendant's suggestion we see no multifariousness in the relief asked. It can all be granted in one decree. A decree subrogating us to the railroad company's rights under its contracts with the towns and ordering the towns to perform that contract for our benefit, is certainly a very simple matter.

In the Belmont case, the question as to whether the decree is to be against the original town of Belmont or its successors, Belmont and Grenard, or the new town of Belmont alone, depends upon the view of the court as to the validity of the division of town indebtedness made by the town auditors. But this does not make that bill multifarious. It is simply the common practice of prayer for relief in the alternative, and all necessary parties are in court. They must stay in till the question is finally decided.

5th. Estoppel.

But defendant's counsel tell us that we are now barred from our equity because we did not set it up in the former case, the one finally disposed of by the decision of the Illinois Supreme Court in *Middleport* v. *Ætna*, 82 Ill., 562. In answer to this it is sufficient to say: 1st. We did not

know at that time that we had any such equity; we could not know about that until the final decision of that case, supposing as we did all through the case that the bonds were valid. 2nd. We could not have set up this equity in that suit even had we mistrusted that we possessed it, for that was a bill by the town to invalidate the *bonds* because irregularly issued. The present equity would have been no answer to such a bill. *Anthony* v. *Jasper Co.*, 101 United States, 697. It was in no way germane to that issue, and only became important after the issue was decided against us. It would have been no answer to the allegation that the *bonds* were invalid to say that there was another and antecedent obligation to the railroad company which was valid. The court would have said: That may be true, nevertheless these bonds are invalid as negotiable paper. As, in effect, it did say.

See page 567 of opinion in Middleport case, which, in terms, holds that the vote under the act of March 7th, 1867, was an appropriation or donation to the railroad company to be paid by taxation, and in no other way; thus recognizing the validity of that obligation to the railroad company while holding the bonds, as such, void. A purchaser under a void execution sale could hardly set up the validity of the original judgment to uphold the sale.

In *Black* v. *Comrs*, 99 U. S., 693, the court says: "That a judgment in a suit between two parties is conclusive in any other suit between them or their privies of every matter that was decided therein, and that was essential to the decision made." * * * "It is conclusive evidence of every fact upon which it must necessarily have been

founded." The case goes further and is authority for us, in holding in the same connection that the U. S. Supreme Court does not assent to the doctrine held by some courts, that the judgment is conclusive of matters incidentally cognizable, if they were in fact decided. So in the case at bar, the question of our right to subrogation was incidental in the former case, not a matter upon which that decree must necessarily have been founded. An examination of *Case* v. *Beauregard*, 101 U. S., 622, and *Stout* v. *Lye*, 103 U. S., 71, shows that they come no nearer to supporting the proposition enunciated by counsel. While *Cromwell* v. *County of Sac*, 94 U. S., 353, followed by *Davis* v. *Brown*, *ib.*, 428, lays down the doctrine as follows: "In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined."

6th. Limitation and Laches.

But defendant's counsel tell us that though our equity were valid and not barred by failure to set it up in the former case of *Middleport* v. *Ætna*, yet it is now stale and barred by the statute of limitations. It is not stale unless it is barred by the statute.

Mere delay alone short of the period fixed as a bar by the statute of limitations will not preclude the assertion of an equitable right. It is only when by delay and neglect to assert a right that the adverse party is lulled into doing that

which he would not have done, or into omitting to do that which he would have done in reference to the matter, had the right been promptly asserted, that the defence of *laches* can be considered.

Gibbon v. *Hoag*, 95 Ill., p. 69 of opinion.

Thompson v. *Scott*, 1 Brad., 641.

Hubbard v. *U. S. Mort. Co.*, 14 Brad., 40.

U. S. v. *Alexandria*, 19 Fed. Reporter, 609; also reported 4th Hughes, 545.

Here there can be no pretence that our delay to sue has wrought an injury to defendants.

As to the question of limitation raised, it must be decided upon the law in force at the time *when the contract was made;* even though a new limitation law were enacted before suit could be brought.

Means v. *Harrison*, Ill. Sup. Ct., June, 1885, 114 Ill., 248.

McMillin v. *McCormick*, 117 Ill., 79.

The first ten year limitation act was passed in 1872, in force July 1st, and is in present R. S., Ch. 83, Sec. 16. This act repeals the act of November, 1849, Sec. 24, which adds: "But this section shall not be construed so as to affect any rights or liabilities, or any cause of action that may have accrued before this act shall take effect."

See also Ills. Stats. "Repealing Act.," chap. 131, Sec. 2.

"The repeal of the acts and parts of acts mentioned in the preceding section" (including Limitation Law of '49) shall not affect pending rights. * * And when any Limitation Law has been revised by this or the Twenty-seventh General Assembly, and the former Limitation Law repealed, such repeal shall not be construed so as to stop the running of any statute, but the time shall be construed as if such repeal had not been made."

When these contracts were made, the Illinois Limitation Law on the subject read as follows:

"All actions founded upon any promissory note, simple contract in writing, bond, judgment or *other evidence of indebtedness in writing*, made, *caused or entered into* after the passage of this act, shall be commenced within 16 years after the cause of action accrued, and not thereafter."

Sp. Laws, '49, p. 44.

In the law of 1859 the term "cause of such actions shall have accrued" was defined to mean the time when action might have been commenced.

Laws 1859, p. 125.

Now in this case the action by the railroad company against the towns on the contract for aid could first have been commenced in July, 1871, when it had built its road in accordance with the stipulations in the votes. This was less than 16 years before the commencement of this suit, but more than five, the limitation for actions on promises not in writing.

We do not think it necessary to argue that the cause of action was suspended by the giving and the taking of the bonds in good faith, longer than to the September term, 1876, of the Supreme Court of Illinois. Until the decision by that court on the bonds at that time, we had good equitable excuse for not bringing this action. We concede that in September, 1876, when the Illlnois Supreme Court made its decision invalidating the bonds, we were thereby apprised of the mistake as to their validity, and might have at once commenced this action. Interest on the bonds was regularly paid until then, but not since. This action was commenced in May, 1886. So in any event it is over five and less than 16 years since the cause of action herein sought to be enforced, accrued, and since payments were made on it. But not over 10 years, as the interest due July 1st, 1876, was then paid.

The statute puts notes, unsealed contracts in writing, bonds, judgments and other evidences of indebtedness, in writing, all into one class for purposes of limitation, and fixes the term at 16 years. It puts accounts, bills of exchange, orders (meaning, of course, bills of exchange and orders not accepted in writing) promises not in writing, express or implied, into another class, and fixes the term at five years. To which class do these contracts of the defendants, to levy, collect and pay over these taxes, belong? Clearly, to the first. It is, and from its nature must be, a contract of record. The votes must be by ballot. The canvassers must make a record of the result. The town clerk and moderator must subscribe minutes of the proceedings and file the same in the town clerk's office.

See Township Org. Law, 1861, Art. 5, Secs. 14, 22, Art 9, Sec. 6.

SEC. 14. "The minutes of the proceedings of every town meeting, subscribed by the clerk of said meeting, and by the presiding officer, shall be filed in the office of the town clerk within two days after such town meeting."

SEC. 22. "The canvass being completed, a statement of the result shall be entered at length by the clerk of the meeting in the minutes of its proceedings, to be kept by him as before required, which shall be publicly read by him to the meeting." * *

SEC. 6. "Copies of all papers duly filed in the office of the town clerk, and transcripts from the book of records, certified by him, shall be evidence in all courts, in like manner as if the originals were produced."

Here it is assumed that the original records are evidence, as they are at common law.

Greenleaf Ev., vol. 1, Sec. 484.

Taxes cannot be voted, levied, extended or collected, unless every step appears of record in the proper public office. So when the voters of a town come into town meeting and cast their ballots for a proposition of this kind, if a majority of them are for it under the law, the town is bound of record just as certainly as a person is so bound who goes into court and assents to the words of the recognizance spoken to him by the clerk. It is not necessary in either case that the party bound should subscribe anything in order to be held by an evidence of in-

debtedness in writing. The statute classes a judgment as an evidence of indebtedness in writing. It applies to such writing when "caused" by the party to be bound. It is not necessary that such party should sign the evidence of indebtedness. A mere entry in a depositor's bank book of amount and date, was held an evidence of indebtedness in writing, under this statute not barred till sixteen years.

Jassoy v. *Horn*, 64 Ill., 379.

In the cases at bar the towns by their competent authorities, the electors, have "caused" certain public records to be made. Those records constitute a complete contract in each case. They are complete evidences of indebtedness in writing against the towns. The statute says that such evidences are barred only by the lapse of 16 years after the cause of action accrues. Here the cause of action accrued less than 16 years before suit brought. We are not within the words of the five year statute, and such statute cannot be extended by implication to cover and to bar anything not expressly within its words. This is not a mere promise not in writing, any more than a recognizance entered of record, a judgment, or any other matter of record pursuant to law. Every step must be in writing or print, from the petition to the final entry of the result of record. It must all enter into the making of the contract and the final record required by law to be made and kept is the evidence of indebtedness in writing. In this case the record was made and we bring suit on that record, *caused* by the defendant. For when the town by its electors set out to submit this proposition, called its voters together, had a vote on it, it thereby caused this evidence of indebtedness in

writing to be made as truly as the recognizor, who holds up his hand and bows his head in court, causes the record evidence of indebtedness, which the clerk by law is bound to enter. The town has also caused other and subsequent records concerning the matter, as set forth in the bills.

It is objected that these contracts are conditional on the performance of something by the railroad company, and therefore could not be in writing. As well say that a conditional bond cannot be in writing.

See *Dunning* v. *Price*, 56 Ill., 339.

In his opinion the learned judge of the court below says:

"There was no agreement in writing between the town and the railroad company for the payment of this appropriation. The vote of the electors clothed the proper officers of the town with authority to pay this sum to aid in the construction of this railroad, and made it the duty of the officers of the town to levy and collect a tax sufficient to secure its prompt payment; and as the law made the appropriation payable 'as soon as the railroad shall have been located and constructed through the town,' it is probable the law would imply a promise on the part of the town to pay when the road was so completed; and the right then accrued to the railroad company to sue for and collect this appropriation, thus bringing the case within the second section of the act of November, 1849, entitled 'An act to amend the law concerning the limitation of actions,' (Purple St. Ill., 731), which limits all actions founded upon accounts, bills of exchange, orders or promises not in writing,

express or implied, to five years after the cause of action shall have accrued."

Our understanding of *Chinquy* v. *People*, 78 Ill, 576; *C. & I. R. R. Co.* v. *Pinkney*, 74 Ill., 277. *Concord* v. *Robinson*, 121 U. S. p. 171. *Fairfield* v. *Gallatin Co.*, 100 U. S. 47, is on the contrary, that the vote of the town makes the binding contract; that it is an express and definite contract according to the conditions of the vote and the law in force when it was taken; that so far from being an *implied* promise on the part of the town it is an *express* contract saved by the constitution of 1870. Now the only question is: "How is this *express* contract evidenced?" Is it by parole or by writing made, caused or entered into by the town? If the latter, then the case comes under the first section, 16 years, if any, of the limitation law; clearly not under the second, as supposed by his honor. Whatever is done by the officers of the town under competent authority, is done by the town itself in its corporate capacity. The officers were authorized and required to record this vote in the records of the town. These are public records, and not the records of a mere private corporation or individual, as the learned judge seems to suppose. For he says further on: "What was done by the voters at their election, although entered upon the town records, does not make a contract in writing with the railroad company, or any other person for the payment of this money; but the law may perhaps be said to imply an obligation to pay this money from the vote of the electors, and the completion of the road. The voters made and recorded their own will in their own record book, and

the law said that this direction of the will of the voters should be carried into effect when the road was completed."

But "their own record book," in which the express agreement to pay this money when the road was completed was duly recorded by the proper officers of the town, was and is as much a public record as a judgment roll. And the first section of the limitation law under consideration says that a "*judgment, or other evidence of indebtedness in writing, made, caused or entered into,*" shall be barred in 16 years, showing that *a public record is evidence of indebtedness in writing*, that will be barred only after 16 years. A public record is for the benefit of whoever may be interested to take advantage of it. Its making and remaining in the proper public office is an evidence of indebtedness in writing. It is made and preserved to evidence the fact to and for the benefit of all whom it may concern.

Greenleaf Ev., vol. 1, sec 483; (11 edition.)

In this respect a public record is different from the private records of a private corporation or a private individual. In such latter case the language of the learned judge would be fit and forcible. But to so emasculate the force and effect of a public record, stating the terms and conditions of an obligation entered into by a municipal corporation, as to say that it is not an evidence of indebtedness in writing, is simply to say that the law requiring such records to be made and perserved, and making them evidence, shall be robbed of most, if not all, of its force and effect. The records of a town, required to be kept by its clerk, are evidence at common law as well as under the

statute. Greenleaf Ev., vol. 1, sec. 483, 484. Dillon Munic. corp. vol. 1, (3d ed.) sec. 305. This is the main object of requiring them.

The officer making the record is the agent of every person in the State. Ib. Here they were made as required by law. There can never be any question as to the terms of the contract. It does not rest in parole or in the uncertain remembrance of witnesses, but it is evidenced in writing in all its terms. The case falls within the language of the 16 year statute, and no reason is perceived why a court should legislate a shorter limitation.

The fact that the contract is on its face conditional, depending on the construction of the road through the town, does not bring it within the five year section. For the Supreme Court of Illinois expressly so held, under the same statute, on a conditional contract in *Dunning* v. *Price*, 56 Ill., 339.

In that case this five year section was pleaded, plea demurred to, and the demurrer, as the Supreme Court said, properly sustained to the plea. The contract was, on its face, payable upon the collection of certain collateral notes, a fact in parole quite as much as the building of a railroad. So the clause of Judge Blodgett's opinion, in which he says: "The time of payment, or whether the sum so appropriated should become due and payable, was wholly uncertain, and rested upon the contingency as to when, if ever, the railroad should be so constructed through the town, thus leaving the time when the payment should be due, if ever, to be determined wholly by outside proof," may be all true, and

yet not make this evidence of indebtedness in writing subject to the five year limitation law, as construed by the highest court whose duty it is to construe that law. So an action of debt on a statute is not barred by the statute of limitations, where not expressly mentioned in the statute, though the facts and circumstances which create the obligation must be determined wholely by outside proof. *Ballard* v. *Bell*, 1 Mason, 243: opinion by Story, justice. Angell Lim., ch. 10, sec. 80.

Furthermore it appears by subsequent town records stated in the bills that the railroad company did accept the appropriation and build the road according to the conditions. So the acceptance is a matter of record, and it is not correct to say that it is "to be determined wholely by outside proof." The whole contract, vote, conditions, acceptance by railroad company, building of railroad according to conditions, is evidenced by public record, made for the use and benefit of every one concerned. If this is not an evidence of indebtedness in writing, what is?

Take the Middleport case for example. Conceding that the town auditors, as held in *Ætna* v. *Middleport*, *supra*, had no authority to order the issue of, or the supervisor and town clerk had no authority to issue, interest-bearing, negotiable obligations of the town, yet the auditors had authority to audit all claims against the town.

Art. 10, Sec. 5, Township Organization laws of 1861, then in force, reads as follows:

"The board of auditors * * shall * * examine and audit all charges and claims against their respective towns * * ."

And Sec. 8. "The following shall be deemed town charges * * 3: The moneys authorized to be raised by the vote of a town meeting for any town purpose. 4: Every sum directed by law to be raised for any town purpose."

That the appropriation of money to encourage a railroad highway in or near a town is a town purpose, and the ordinary town officers are the proper authorities to carry it out, has often been held in Illinois.

C., D. & V. R. R. Co. v. *Smith*, 62 Ill., 268.

The audit then by the town board, and the record thereof, evidences in writing the fact that the claim of the railroad company was and is a valid town charge—an indebtedness of the town.

The bonds themselves, issued in pursuance of that audit by the supervisor, chief executive officer of the town, and the town clerk, keeper of its records, while void as interest-bearing obligations or negotiable instruments, are certainly evidences in writing of the indebtedness, and of the completion of the railroad, in accordance with the conditions of the vote. Who should determine this except the auditors, includiug the town clerk and the supervisor? The fact that they caused these records to be made and the bonds to issue is, of itself, evidence in writing of the completed indebtedness of the town to the railroad company.

The subsequent records, after that of the vote, in the other cases, though varying somewhat in each case, also afford abundant evidence in writing of the indebtedness of the respective towns. We respectfully refer the court to

them in the several records, without further particularizing here. (See pp. 6, 7, and 8 of the records.)

It seems to us very clear that the records and recitals in each case, taken together, constitute such evidence in writing of the debt as to take it out of the five year limitation concerning promises not in writing. We might go further and maintain that, being matters of public record, they constitute a *specialty*. They *import verity*.

Dillon Munic. Corp., vol. 1, Sec. 299, (3d ed.)

Whatever writing or record does that is a *specialty*, and not within the statute of limitations, unless specially named. As a justice docket entry of judgment.

Pease v. *Howard*, 14 Johns, 479.

Or an arbitrator's award:

Angell Lim., (4th ed.), Sec. 86.

Or any deed under seal:

Ib., Sec. 87.

Here the action is founded upon a *grant of record*—quite as much a specialty as a deed.

In *Bourland* v. *County of Peoria*, 16 Ill., 538 it was held that memoranda of record, much more incomplete than these, would take a case out of the statute of frauds, requiring writing to be signed by the party to be charged, as against the county whose records they were. The memoranda were made by the clerk of the county commissioner's court.

The supreme court says: "While the entries do not specify this arrangement particularly, yet," taking them together in connection with the outside proof, "we can entertain no doubt." "These several memorandums are a sufficient writing, and signed by the party to be charged therewith, to take the case out of the statute of frauds." Further, the court says that in such a case a bill for specific performance would not be barred before twenty years. Certainly these much more complete records in this case take it out of the statute of five year limitations. Nothing short of *twenty* years, according to the above holding, would bar this bill. That case was decided in 1855, while the limitation laws under discussion were in force, and is conclusive of the construction placed on them as applicable to a case similar to the one at bar. The only difference is that in that case the memoranda of record were construed as an equitable grant of lands, while here they constitute a grant of money. But in that case the county had re-sold the lands to an innocent purchaser, and it was decreed that in lieu thereof it pay the assignee of the party entitled under the original contract, the value thereof, with interest, in lieu of the lands. So that was a money decree against a municipal corporation on memoranda of record, and the court says: "The statute of limitations cannot avail as a defense. This may not be a direct trust of the kind not falling within the statute of limitations, but in disposing of such a defense as applicable to the question of refunding the purchase money, or returning the price received for the land on re-sale, we may adopt the analogy to the bar of an ejectment, or bill for specific performance, as more appropriate and equitable than the

action of debt for the money, which would shorten the period of defense."

Bourland v. *Peoria*, 16 Ill., 546.

Here is a direct holding in point. The memoranda of record took the case out of statute of frauds and out of the five year limitation law. In the cases at bar we only insist that the record memoranda of the township grants of aid to the railroad company take such grants out of the five year limitation law, as affording evidences in writing of the indebtedness.

CONCLUSION AND SUMMARY.

If the salient points of these present cases are clearly defined the distinctions between them and the cases which the counsel for the towns invokes will appear so broad that no confusion can arise. We ask to be subrogated to well settled rights which the railroad company has against these towns on contracts of record with it, caused and entered into by these towns at the polls. They are evidences of indebtedness in writing. We come into a court of equity to secure this subrogation because under our practice in Illinois we can obtain it in no other court. Our title to this subrogation arises from the fact that we purchased of the railroad company the bonds issued to represent and fund these contracts which afterward turned out to have been issued without due authority by the town officers, and therefore void as negotiable, interest-bearing instruments. But the towns got the benefit of the contracts in the railroad built by our money in part. They have nothing to com-

plain of, because their contracts are binding on them in favor of the railroad company or us. The railroad company has nothing to complain of, and does not complain, because it received full value from us by virtue of its contracts with the towns and the bonds issued thereon. So far the loss has fallen entirely upon us. But here are these contracts, to which equity under its well defined jurisdiction may and should subrogate us, which will partially re-imburse us for our loss. And equity having jurisdiction of the case for such purpose of subrogation will go on and do full and complete justice by decreeing against the towns a specific performance of their contracts in our favor. As the railroad company holds these contracts in trust for us, the equitable assignee of that trust, this court of equity, now having jurisdiction of the whole matter, can but enforce it in our favor.

As said by the Supreme Court of the United States in *Marsh* v. *Fulton Co.*, *supra:* "The obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority of law, the law, independent of any statute, will compel restitution or compensation." That is what these towns have done, they are in a position where compensation may be lawfully enforced by this court and we cannot doubt that it will be done.

JAMES H. SEDGWICK AND
O. J. BAILEY,
Counsel for Appellant.

124-534-551

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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1887.

THE ÆTNA LIFE INSURANCE CO.
vs.
THE TOWN OF MIDDLEPORT et al.
} No. 1,134. Appeal from U. S. Circuit Court, Northern District of Illinois.

THE ÆTNA LIFE INSURANCE CO.
vs.
THE TOWN OF BELMONT et al.
} No. 1,135. Appeal from U. S. Circuit Court, Northern District of Illinois.

THE ÆTNA LIFE INSURANCE CO.
vs.
THE TOWN OF MILFORD et al.
} No. 1,136. Appeal from U. S. Circuit Court, Northern District of Illinois.

ARGUMENT

of FRANCIS FELLOWES,

Counsel for Plaintiff and Appellant.

IN THE UNITED STATES CIRCUIT COURT. FILED AS ARGUMENT, IN THE SAME CAUSES,—IN THIS COURT.

HARTFORD, CONN.:
PRESS OF THE CASE, LOCKWOOD & BRAINARD COMPANY.
1887.

IN THE

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1887.

THE ÆTNA LIFE INSURANCE CO.
vs.
THE TOWN OF MIDDLEPORT et al.

No. 1,134.
Appeal from U. S. Circuit Court, Northern District of Illinois.

THE ÆTNA LIFE INSURANCE CO.
vs.
THE TOWN OF BELMONT et al.

No. 1,135.
Appeal from U. S. Circuit Court, Northern District of Illinois.

THE ÆTNA LIFE INSURANCE CO.
vs.
THE TOWN OF MILFORD et al.

No. 1,136.
Appeal from U. S. Circuit Court, Northern District of Illinois.

ARGUMENT

Of FRANCIS FELLOWES,

Counsel for Plaintiff and Appellant.

HARTFORD, CONN.:
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May it please your Honors to indulge me, in a few observations upon the single point decided by the learned judge below, regarding the Statute of Limitations, upon which alone he sustained the demurrer, and dismissed the bill.

The bill alleges that the Danville Railroad Company had a right of action against the defendant to recover an appropriation of $15,000, made by virtue of an express contract in writing, between the defendant and that company, to be paid by a special tax, set apart for that purpose. The bill also alleges, that this contract was make by the ballots of the legal voters of the town, under the authority of an act of the Legislature, authorizing towns to grant aid to the Danville Railroad Company.

The bill also alleges, that the result of the ballots was declared in open town meeting, and expressed in the form of a vote, subscribed by the Moderator of the meeting, attested by the town clerk, and recorded by him, on the records of the town.

The bill also alleges, that the ballots were cast, as required by the law, upon a proposition to levy and collect a tax of $15,000, to aid in the construction of the Danville railroad, provided Watseka should be made a point.

This condition was expressed in the vote. The time when this tax should be paid over is prescribed in the Act of the Legislature.

The bill avers, that the legal effect of these ballots and of this vote, so recorded, was to create a contract in writing, between the Railroad Company and the town, by virtue of which the Railroad Company, thereupon, became vested with a conditional title to the money voted, and to the tax set apart for its payment.

If the averments of the bill, as to the legal effect of the vote and its record, are correct, it follows that the vote and its record

created an express contract in writing by virtue of which the Railroad Company became vested with a conditional grant of the money voted, which no future action of the town or its officers could annul or impair.

The contract, though conditional, was binding, from the moment the vote was declared and recorded, and after the adjournment of the meeting, when the proceedings ceased to be *in fieri*, no act of the town, or of its officers, could destroy or impair its force, or deprive the Railroad Company of its title to the money, and to its right to the special tax voted as a fund and security for its payment.

It was in effect a grant to the Railroad Company, conditional, it is true, but no less a grant, which no subsequent act of the town, or its officers, or even the Legislature itself, could impair, and which would cease to have effect only by the failure of the Railroad Company to perform the prescribed conditions.

It was held by this Court in Von Hoffman *vs.* Quincy, 4 Wallace, 585, and in Galena *vs.* Amy, 5 Wallace, 705, that a special tax, voted by a municipal corporation, to pay an appropriation, was in the nature of a *trust*, in behalf of the person to whom the appropriation was made, which no act of the Corporation, nor even the Legislature itself, could impair.

I submit to your Honors that the proceedings and acts of the town of Middleport, through its legal voters at the polls, created an express contract, by force of which, the Railroad Company became invested with a right to perform the conditions, and thus entitle themselves to the money, and that meanwhile no acts of the town or its officers could affect this right, or change the relations of the parties.

The bill alleges that the appropriation, made by virtue of the vote, was, at or about the time of making the same, recorded by the supervisor of the town, upon a book kept for that purpose by the Railroad Company, to the intent that the company should have due knowledge and evidence of the appropriation, and be bound on its part to fulfill the conditions.

The bill also alleges, that the Railroad Company had full knowledge of the proceedings, vote, and appropriation, and of the conditions thereof, assented to these conditions and complied with them; and relying on the good faith of the town of Middleport, constructed its railroad through said town.

It is difficult to see how it can be maintained that there was no contract between the parties, and no mutuality, during the progress of the work, and not even when it was completed, as intimated by the learned judge, unless perhaps there be an implied promise to pay for what had been done.

I therefore take issue with the learned judge upon his assertion that the proceedings of the town meeting created no contract, and that there was no contract of any kind between the town and the Railroad Company, until the completion of the road, when *probably* the law implied a promise. In effect the learned judge holds that the town meeting was a mere family council to act upon family matters, and to instruct the heads of the family what to do, and not a meeting held under the authority of the act of the Legislature of Illinois, for the purpose of carrying out the intent of that act, by providing aids to Railroad Companies. The construction of the learned judge virtually annuls that act, and deprives it of its efficacy. If, as the judge says, there was no agreement, it follows that the town was at liberty to dispose of the fund, provided by the vote, in any manner it should please, without regard to the Railroad Company, and thus frustrate the design of the legislature to provide substantial aids, upon which Railroad Companies could rely in the prosecution of their enterprises. If this construction be correct, it is obvious that no Railroad Company would undertake to construct a road through any town, simply because of a promise *probably* implied by law.

Permit me here to advert to the point made by my associates in regard to the meaning of the Constitution of Illinois, adopted in 1870, which forbids municipal corporations to grant aid to railroad companies, but exempts from the operation of this provision grants made before the Constitution should go into effect. The donation in this case must be considered as complete, since the Supreme Court of Illinois has held that there was no authority in this case to issue bonds. The question therefore is, whether or no there was any contract-relation between the Railroad Company and the town, which bound the town to apply the fund provided by the vote to the payment of the Railroad Company for its expenses in constructing the road. Even the learned judge, in speaking of the proceedings of the town, unconsciously I presume, calls what was done "an appropriation." An appropriation which the appropriators are at liberty

to recall, and to which the party to whom the appropriation is made has no legal right, would be a novelty in law. Common sense repudiates the decision of the learned judge, that in this case there was no agreement. The law provided the only way in which an agreement could be made, that is, by the corporate action of the town, through its voters at the polls. Such corporate action was the only mode in which it could be made. If made at all, it was in writing,—a writing of peculiar solemnity in the law, a matter of public record. The learned judge, in his opinion, seems to overlook the fact that the record is a public record, made for the benefit of every person who has any interest in the matter recorded, and which, the statute-law of Illinois provides, shall be evidence in all courts. It is not a mere entry upon the memorandum-book of the family represented in council, as the learned judge seems to suppose, when he says in his opinion: "The voters made and recorded their own will in their own record-book." I submit to your Honors that this will, so made and so recorded, was not confined in its effects to the towns and their officers, but was a grant of aid, under the authority of the act of the Legislature to the Danville Railroad Company of which nothing could deprive that road, except a refusal or neglect of that company to accept or perform its conditions. The performance of these conditions, be it observed, is no part of the contract, and does not enter into the question whether the contract was in writing or not. A conditional contract is as much a contract as any other, and is no more affected by the Statute of Limitations than any other contract. That the performance of the conditions must be proved by parole is entirely immaterial. I submit to the court that the rights of the Railroad Company to this appropriation, which this bill seeks to enforce, are evidenced by writing, and if they exist at all, must be proved by writing, and can be proved by no other mode.

The Statute of Limitations therefore has no application to the present case, and the plaintiff is at liberty to enforce his undoubted equities, as he is seeking to do, by this bill.

FRANCIS FELLOWES,
Of counsel for Plaintiff and Appellant.

United States Circuit Court.

NORTHERN DISTRICT OF ILLINOIS.

IN EQUITY.

ÆTNA LIFE INSURANCE COMPANY

VS.

THE TOWN OF MIDDLEPORT et al.

ARGUMENT

Of FRANCIS FELLOWES,

For the Plaintiff.

This Argument is designed to be used in the three cases, involving the same questions, now pending in this court, to wit:

THE ÆTNA LIFE INSURANCE COMPANY
vs.
THE TOWN OF MIDDLEPORT *et al.*

THE ÆTNA LIFE INSURANCE COMPANY
vs.
THE TOWN OF BELMONT *et al.*

THE ÆTNA LIFE INSURANCE COMPANY
vs.
THE TOWN OF MILFORD *et al.*

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ARGUMENT.

MAY IT PLEASE YOUR HONORS:

This bill is founded upon the equitable principle of subrogation.

Subrogation is defined to be "the substitution of another person in the place of a creditor, so that the person, in whose favor it is exercised, succeeds to the rights of the creditor, in relation to the debt."

In this case, the debtor is the defendant, the town of Middleport, the creditor is the Chicago, Danville & Vincennes Railroad Company, also a defendant, and the person substituted is the plaintiff, the Ætna Life Insurance Company.

The case comes on for hearing upon a demurrer, filed by the town of Middleport, alleging as causes of demurrer:

1. That the Bill is multifarious.
2. That it is defective in dates and names.
3. That it is barred by the statute of limitations.
4. That it is barred by *laches*.

And finally, that it shows no equity to the relief demanded.

1. As to the first named cause, multifariousness, the language of the demurrer is as follows:

"Bill shows it is exhibited against respondent and the Chicago, Danville & Vincennes Railroad Company, and William Lyford, its receiver, as respondents thereto, and the facts set forth therein show the same relief cannot be granted against all of said respondents, and fails to state facts showing respondents jointly liable, but states facts which show this respondent, if liable at all, is not jointly liable, or in any manner connected with the others, and bill is multifarious."

Multifariousness, as defined in the text-books, consists in

"Uniting in one bill of several matters *perfectly distinct and unconnected*, against *one* defendant, or the demand of *several matters of a distinct and independent nature* against *several* defendants." *Story Eq. Pl.*, § 271.

Any one, upon reading this bill, will discover, at once, that it is not open to this objection. The object of the bill is one, entire, and indivisible. It is simply the subrogation of the plaintiff to the rights of the defendant Railroad Company, against the defendant, town of Middleport, and the enforcement of those rights against that town, for the benefit of the plaintiff. It demands no relief against that company. That company is made a party solely upon the ground of its supposed interest in the subject matter.

The idea that a bill is demurrible, because it fails to allege a joint liability, on the part of the defendants, will be *novel* to equity pleaders. If well founded, it will exclude all parties hitherto considered necessary by reason of interest, and against whom no relief is demanded. *Story Eq. Pl., Parties.*

Neither the omission to state facts, which show the defendants to be jointly liable, nor the statement of facts, which show that they are jointly liable, renders a bill multifarious. To render a bill multifarious, there must be a demand for relief, grounded upon *distinct and independent* matters, against *one* defendant, or upon *several matters of a distinct and independent* nature, against *several* defendants. In this case, there is no demand for any relief against any defendant, except the town of Middleport, and that relief is demanded upon one single ground.

As to the allegation, that the bill does not show the demurring defendant to be liable in any manner, connected with the others, it is sufficient to say, that there is no pretence in the bill, that the railroad company, or its receiver, is in any manner liable to the plaintiff, they being made parties, simply on the ground of interest in the subject matter, as required by the well-known and long-established rules of equity pleading.

Surely, the learned pleader, when he inserted in his pleadings multifariousness, as a cause of demurrer, must have been unconscious of his elementary learning.

2. As to the omission of names and dates, there is no omission of names, except it be of the place of residence of W. H. Lyford, the receiver, which, it may well be presumed, was unknown to the plaintiff. But this objection is premature, as W. H. Lyford is not yet made a party, and could not be, without contempt of court, except by its leave. The bill merely prays for

leave to make him a party, and as to the omission of his Christian name, except the initial letter, the demurrant has supplied the means of remedying any defect in this respect, by stating his full name, William Lyford, so that if the court grants the desired leave, and his residence can be ascertained, both his name, in full, and his residence, can be inserted in the bill, and in the subpœna.

The omission of dates, referred to, is not such as to affect the bill in any material point.

These omissions are three in number. On p. 3, the day in July, 1871, on which the railroad company completed its road, stands blank. The allegation is, therefore, in effect, that this company completed its road on some day in July, 1871. This is enough. The condition of the contract was, that it should complete its road before it should become entitled to the appropriation made by the town. No day is named in the vote. The completion of the road, not its completion on any particular day, is all that was required, and this was required by the act which authorized the appropriation.

Nor is this omission material, so far as regards the statutes of limitation, whether the time, prescribed by them, be five years, ten years, or sixteen years. If it be five years, or ten years, the statute has run upon the cause of action, so far as it regards the contract, even if the company had completed its road on the first day of July, 1871. But if the time be sixteen years, then, no matter what day in July, 1871, the cause of action was complete, the full time of the statute had not run, when this bill was filed.

On page 6 of the bill may be found two other blank dates. The bill alleges, that on or about the day of , 1871, the railroad company put the bonds, which had been delivered to it in payment of the debt, upon the market. This is equivalent to an allegation, that this company put the bonds upon the market sometime in the year 1871. The pleader leaves the blank to be supplied by the court, upon motion, as the exact day may appear from the evidence, in the progress of the trial.

On the same page 6, the bill alleges that on or about the day of July, 1871, the plaintiff bought these bonds in the market, — equivalent to an allegation that it bought them in July, 1871. The same observations are applicable to the last-mentioned blank.

But if the plaintiff should not be able to supply these blanks, from the evidence on the trial, a court of equity will hardly feel itself justified, on this account, in denying to the plaintiff its equity. A demurrer, in equity, finds itself in a far different atmosphere from a special demurrer at common law for want of certainty to a certain intent in every particular. In equity, it is enough that the equity can be established, even without any greater certainty, as to time, than is essential to show that the equity exists.

I feel that I have given to these points quite as much consideration as they deserve. I cannot suppose that the pleader was very serious in assigning them as causes of demurrer, but threw them in, as the phrase is, to fill up; or as is sometimes said, as make-weights.

3. I pass on to the statute of limitations assigned in the demurrer, as a bar to this bill. The words of the pleader are embraced in the two following paragraphs:

"Fails to show any written agreement, on which suit is brought, that would bind respondent, and fails to state facts showing a cause of action exists against respondent, that arose within five years last past before bringing of suit.'

"Fails to show any written agreement, on which suit is brought, binding on respondent, on which has arisen a cause of action within the last ten years, prior to bringing this suit."

The first proposition, in the above paragraphs, seems to be a demurrer founded, not so much, if at all, on the statute of limitations as upon the absence of a *written* agreement, as though a town could not be bound by contract with a railroad company, unless the contract is in writing. If such be the meaning, I make two answers:

First. The proposition is not true in fact. The allegations of the bill show, most emphatically and distinctly, that the contract between the town of Middleport and the railroad company was in writing. They show that the vote of the town, by which the obligation to that company was created, was in writing; was attested by the moderator and by the town clerk, and, as so attested, was recorded by the town clerk on the records of the town, and was also transcribed by the supervisor of the town on

a book of the railroad company, kept for that purpose, in order to furnish evidence to the company of the obligation of the town. If this does not constitute a written contract, it is impossible to conceive how a contract in writing could be made.

Second. The proposition is not tenable in law. No written contract was necessary to bind the defendant. No statute requires it. The demurrer, on this ground, is simply *frivolous*, even if the bill fails to show a written contract.

But, perhaps the pleader, in this paragraph, means to do nothing more than to set up the bar of the statute of limitations, because the action was not brought within the time prescribed. Perhaps he means to say, that the contract was not in writing, and was therefore barred in five years, and if it was in writing, it was barred in ten years.

Whatever the pleader means, the question raised by this demurrer, upon the allegations of this bill, so far as regards the statute of limitations, has been recently settled by the Supreme Court of Illinois, in Means *vs.* Harrison, reported in Illinois Rep., Vol. 114, p. 248. Your Honors will not fail to observe, that, as this decision relates to the construction of a statute of a State, its authority is such, that it will ordinarily be followed by the Federal Courts, in construing the same statute.

The result of this decision is, that, upon written contracts, existing when the act of 1872 was passed, the period of limitation is sixteen years, although the cause of action might not then have fully accrued. The proviso of the act of 1872, the court held, saved all existing contracts, no matter whether mature as grounds of action or not, so that whenever action should be brought upon them, they were not subject to the limitation provided in the statute of 1872, but were barred only by the expiration of sixteen years from the time the cause of action upon them accrued. I refer your Honors to the case. It speaks for itself. It is not necessary for me to do more than show its applicability to this case, which I proceed to do.

The contract between the town of Middleport and the Chicago, Danville & Vincennes Railroad Company is alleged, in the bill, to be a contract in writing. The bill further alleges that the votes of the town, and all the proceedings by which the contract was created, were reduced to writing, duly attested by the moderator of the meeting which passed them, and also by the

town clerk, and as attested, were recorded on the records of the town by the town clerk.

Further, the bill alleges that the appropriation so made, that is, by virtue of the vote above referred to, "was at, or about the time of making the same, entered and recorded by the supervisor of said town upon a book kept for that purpose by the said railroad company, to the intent that said company should have due knowledge and evidence of such appropriation, and be bound on its part to fulfill the condition upon which such appropriation was made."

These allegations must, upon this demurrer, be taken to be true, and if they do not set forth a contract in writing between the town and the railroad company, it is impossible to conceive what allegations would have that effect.

"A written contract," says Mr. Bishop, in his work on contracts, "is one all the terms of which are reduced to writing." Neither, according to the same author, and other acknowledged authorities on the same subject, is it necessary that a contract should be signed, in order to give it the effect of a written contract. All that is necessary is that it should be complete in its terms, and be regarded by the parties as in force.

This contract was created by the town, acting in its corporate capacity; that is, it was created by the ballots of the voters, cast under the authority of the acts of the legislature,— the only mode in which it could be created, and being so created, it was reduced to writing, attested, and recorded, by the proper agents of the town both on the records of the town and on the book kept for that purpose by the railroad company.

Thus the terms of the contract were reduced to a certainty. Both parties had a written record of them, to which they could refer, and by which they were bound. Nothing depended on the frailty or uncertainty of human memory. All the purposes of the statute of limitations, in allowing a much longer time to written contracts than to verbal contracts, were fully accomplished.

To test this question,— suppose an action upon this contract, to be brought by the railroad company against the town, and to be pending in court, what would be the proper mode of proving the contract? Certainly not the memory of witnesses, the *parol* testimony admissible in cases of *parol*, or *verbal*, contracts, but these

very records, or duly authenticated copies of them, would alone be admissible. Only, in case these records were lost or destroyed, would it be legal to resort to the memory of witnesses, and then, not to prove what the contract was, but what saith the record. The record alone would be the only witness, and it would be only by proving what the record said, that you could prove what the contract was.

It will be observed that this contract was not a contract *inter-partes*. No agreement of any kind, on the part of the railroad company was required, or was made. The conditions on which the contract became absolute, except such as were expressed in the vote, were written in the act of the legislature which authorized it, and could be proved only by referring to that act.

If this bill had been filed within five years after the cause of action accrued, no oral evidence would have been admissible to prove the contract. The court would have said: Go to the written evidence on record. Go to the book of the town, where the proceedings of the town and its vote were recorded, go to the book of the railroad company, where the supervisor of the town entered these same proceedings and vote, go to the act of the legislature which prescribes the conditions.

But why need we discuss the question, whether or not the record of the town constitutes a *technical contract?* All that is required to exempt this case from the operation of the statute of limitations is that there shall be *written evidence of the indebtedness*, on which the bill is founded.

Your Honors cannot fail to observe that the legislature regarded substance more than form, and that hence the language of the act is exceeding broad.

My learned friends and associates have transcribed it in their brief, as follows:

"All actions founded on any promissory note, simple contract in writing, bond, judgment, *or other evidence of indebtedness in writing*, made, caused, or entered into, after the passage of this act, shall be commenced within sixteen years after the cause of action accrued, and not afterwards."

I have only to refer to the record of the town. There is the written evidence of the indebtedness, full and complete, no matter whether it constitutes a *technical*, legal, contract or not.

The words of the statute and this record are fatal to the defendant's demurrer, and show, beyond all controversy, that this action is not barred by the statute of limitations. What single *item* of evidence is wanting in this record, unless it be evidence of the conditions prescribed by the legistature, which are contained in the act itself? Bring thence the proof of the contract, and of the conditions to be performed. That only will we hear.

If this be so, there is an end of this question of the statute of limitations. The cause of action was complete, as the bill alleges in 1871, no matter on what precise day, even if it were the first day in the year. This bill was filed in 1886. Sixteen years from the time, when the right of action accrued, had not expired before the filing of the bill.

But this question of limitation, arising under the statutes relating to debts and contracts, may not be decisive of the plaintiff's rights in this cause.

The same act of the legislature of Illinois, which authorized the town to make the appropriation, required it to provide a security for its payment, in the form of a special tax. The words of the act, Sec. 2, are:

"The authorities of said towns, respectively, are hereby authorized, and *required*, to levy and collect a tax, and to make such other provisions as may be necessary for the prompt payment of the appropriation under the provisions of this law."

Accordingly, the legal voters, who authorized the appropriation, did, in obedience to this law, at the same time, vote for a special tax, as a security for its payment.

My position is, that this tax is a special security, in the nature of a trust, with a power in trust in the proper authorities, for the benefit of the railroad company, and those who may have its rights, which no act of the town, or of the legislature itself, could take away or impair. I refer your Honors to the opinions of the Supreme Court of the United States, in Von Hoffman *vs.* Quincy, 4 Wallace, 585, and in Galena *vs.* Amy, 5 Wallace, 705. In the courts of the United States, this principle can be no longer questioned.

My position can be stated in few words. It is this. By reason of this special tax, the railroad company acquired a security,

in the nature of an express trust, against the enforcement of which the statutes of limitation, relating to debts and contracts, did not run, if indeed, being in the nature of property vested in them, it was subject to any limitation from lapse of time. It is well known to your Honors that the security of a lien, whether on personal or real estate, is not impaired, because the debt is barred by the statute of limitations.

I submit to your Honors that the question of the right of the railroad company, and of the plaintiff, as subrogated thereto, to enforce the levy and collection of this tax, notwithstanding the lapse of time, does not arise upon this demurrer, which does not touch this alleged equity of the plaintiff's bill, and must, if need be, be reserved for some future stage of the proceedings.

This defendant must seek its exemption from its obligations somewhere else besides the statutes of limitation. Neither will multifariousness, nor defect in dates and names, suffice for its relief from the demands of the bill. What next?

4. *Laches* by reason of delay, without excuse, is the next resort. The plaintiff might have said, in excuse for the delay, that the town of Middleport paid it the interest on this debt for five years. Such an allegation is to be found in the bill, but not as a formal excuse for delay. So we must now defend ourselves against this charge of *laches*.

The defendant says we have slept upon our rights until we have none.

Fortunately for us, the same Supreme Court of Illinois, whose judgment has removed out of the way the statute of limitations, has also removed, by the legal effect of its judgment, the bar of *laches*. It could not be otherwise. It is not possible to hold that a claim, not barred by the statute of limitations, is barred by *laches*, consisting in mere delay by lapse of time. If the action is not barred by the statute of limitations, it is simply childish to say, well, it is barred by *laches* arising from lapse of time.

In 1880, — the case must be fresh in the recollection of the learned pleader who framed this demurrer, — the Supreme Court of Illinois, in Gibbons *et al. vs.* Hoag, 95 Ill., 47, decided as follows:

"Mere delay alone, short of the period fixed as a bar by the statute of limitations, will not preclude the assertion of an equitable right. It is only when, by delay, and neglect to assert a right, the adverse party is lulled into doing that which it would not have done, with reference to the property, had the right been promptly asserted, that the defense of *laches* can be considered."

The same principle was decided, still more recently, in Warden *et al. vs.* White, 14 Bradwell's Rep., 50.

There is nothing in the bill which shows that the defendant has been prejudiced by delay. Neither is there in the demurrer. Indeed, nothing of that kind could have been inserted in the demurrer, without making it, in the language of the books, "a speaking demurrer." But the learned pleader, alleging that the plaintiff has not, in his bill, shown any excuse for his delay, proceeds to demur, on the ground of *laches*, evidently, not aware that, for that very reason, he was precluded from demurring.

I beg leave to call the attention of the Court to the case of School Trustees *vs.* Wright *et al.*, 12 Ill. Rep., 432, and to the case of O'Halloran *vs.* Fitzgerald, 71 Ill. Rep., 58, in which it is said, that "where there is no attempt in the bill to account for delay, *laches* must be set up in an answer, and is not otherwise available."

I have made all the observations upon these several grounds of demurrer which I think it necessary to make. But the learned pleader says, as a final cause of demurrer: There is no equity in the plaintiff's bill. This is matter of grave moment. Leaving the small things behind, let us proceed to consider this. *Paullo majora canamus.*

5. The equity alleged in the plaintiff's bill is, as I have said, the equity of subrogation. Before proceeding to call the attention of the court to the facts from which this equity arises, it may be useful to advert to the instances in which the right of subrogation exists and to the principles on which it rests.

The cases in which subrogation, independently of agreement, takes place, are enumerated by Mr. Sheldon, in his treatise on that subject, page 3, § 3.

"Subrogation," Mr. Sheldon says, "as a matter of right, independently of agreement, takes place only for the benefit of insurers; or of one who, being himself a creditor, has satisfied the lien of a prior

creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he purchased; or of a creditor, or surety, who has paid the debt which, in whole or in part, ought to have been met by another; or of an heir who has paid the debts of the succession; or of one who has paid his own debt, the burthen of which has, for a valuable consideration, been assumed by another."

In the almost infinite variety of human relations, it can hardly be supposed, that these instances exhaust the subject. They do not necessarily embrace every case in which subrogation takes place. The same author says, p. 2, the doctrine of subrogation "is broad enough to include every instance in which one party pays a debt, for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter." *Provided*, however, the party paying the debt is not a mere stranger, who officiously intermeddles, and pays the debt, as a volunteer.

I may anticipate the argument, so far as to say, that this statement of the doctrine is broad enough to include the present case. There can be no doubt that, according to the allegations of the bill, the plaintiff has paid a debt, for which the town of Middleport was primarily liable, and which should, in equity and good conscience, have been discharged by that town. Neither do the allegations of the bill leave any doubt, that the plaintiff, in paying this debt, was not a *volunteer*, but sustained to the creditor the relation of an *equitable assignee*. In other words, the facts show that both the railroad company and the plaintiff acted upon the assumption that that company was invested with a title to the debt, which it had a right to convey to the plaintiff, even without the consent of the debtor, and that, by force of what was done, the plaintiff, in equity, became invested with that title. The law of equity implies, that what ought to have been done was done, and construes the transaction as an *equitable* assignment, which your Honors are called upon to enforce. It must be observed, that the debtor has nothing to do with the transaction. The creditor was the owner of the property, the debt, and had a right to transfer its title to the plaintiff, in any legal mode, whether by an actual, written, legal assignment, or by a mode from which equity would imply an assignment. No legal, or equitable right of the debtor is affected thereby. The debtor is bound to pay its

honest debts, in whosesoever hands they may be. If it be said, that in subrogation *pure*, as distinguished from *conventional* subrogation, the debt is extinguished, so that the person subrogated is not subrogated to the debt itself, but merely to a right of reimbursement for having paid it, I answer, the distinction, as to all practical results, is a distinction without a difference. If it be said that, in the instances enumerated by Mr. Sheldon, no element of agreement is apparent, and that this case does not fall within the principle of these cases, I answer, that in every case there exists an implied, *equitable* promise, on the part of the debtor, to indemnify the party by whose money the debt is paid. This brings us to the question upon what principles the right of subrogation is founded.

Let me refer to some of the many cases, both in Great Britain and in this country, which lay down the proposition broadly, that subrogation is not founded upon *contract*, but upon *natural justice and equity*.

The first case to which I call your Honors' attention, is Hodgson *vs.* Shaw, 3 Mylne & Keene, 191, in which Lord Chancellor Brougham, in giving the opinion, said:

"The case standing thus at law, do considerations of equity make any alteration in its aspect? The rule here is undoubted, and it is one founded on the plainest principles of natural reason and justice, that a surety, paying off a debt, shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high, and the right results more from equity than from contract, or *quasi* contract, unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication. The doctrine of the court, in this respect, was luminously expounded by Sir Samuel Romilly, in Craythorne *vs.* Swinburne, 14 Ves., 160, and Lord Eldon, in giving judgment in the case, sanctioned the exposition by his full approval. 'A surety,' to use the language of Sir Samuel Romilly's reply, 'will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security, and all means of payment, to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into *without the knowledge* of the surety; having a right to have these securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor.'"

Your Honors cannot fail to observe, that Lord Brougham, in this opinion, thinks it hardly possible to place this doctrine of subrogation on too high ground, and considers it as resting *not only upon principles of natural justice*, more than upon contract, or *quasi* contract, unless so far as equity, imported into the transaction, may be considered as raising an *implied contract*, but in the words of that great equity advocate, Sir Samuel Romilly, holds, that the surety is entitled to stand in the place of the creditor, not only through the medium *of contract*, but as having a right founded *on natural justice*, even to securities of which *he had no knowledge.*

Let me next call your Honors' attention to the opinion of the Court of Appeals of the State of New York, in Matthews *vs.* Aikin, 1 Comstock, 595. The summary of the case is:

"The right of a surety to be subrogated, on payment of the debt, to the securities held by the creditor, does not depend upon contract, but rests upon principles of justice and equity."

Comstock *J.*, in giving the opinion of the court, said:

"It is a general and well-established principle of equity, that a surety, or a party, who stands in the situation of a surety, is entitled to be subrogated to all the rights and remedies of the creditor whose debt he is compelled to pay, as to any fund, lien, or equity, which the creditor had against any other person or property, on account of such debt. The general doctrine, as a rule of equity, is not controverted, on the part of the appellants, but is fully conceded. It is insisted, however, that the guarantor, in this instance, did not become such, *at the request of the debtor.* That as to the debtor, he was a mere volunteer, having no remedy over against him, and never acquiring the character of a surety, so as to be entitled to subrogation to the rights and remedies of the creditor. The objection seems somewhat narrow and technical, when addressed to a court of equity, whose peculiar province it is to mete out substantial justice, when the more restricted powers of the common law fail in its administration. But it leads us to examine carefully into the grounds and principles upon which the right of subrogation rests. Does it rest upon the foundation of a contract, binding in a court of law, between the debtor and his surety? In other words, does it turn substantially upon the question, whether or not, the surety, who has paid the debt to the creditor, has a remedy over on his contract against the principal, for the money paid, in an action at law? Or, does it not rest rather upon the broader and

deeper foundations of natural justice and moral obligation? Chancellor Kent says, in Hays *vs.* Ward, 4 John Ch., 180: 'This doctrine does not belong merely to the civil law system.' It is equally a well-settled principle, in the English law, that a surety will be entitled to every remedy which the principal debtor has to enforce every security, and to stand in the place of the creditor, and have those securities transferred to him, and to avail himself of those securities against the debtor. This right stands not upon contract, but upon the same principles of natural justice upon which one surety is entitled to a contribution against another."

In Furnold *vs.* Bank, 44 Missouri, 338, the court say:

"That the claim of the surety against the principal is founded, not on *contract*, but upon a principle of natural justice and equity."

"This equity springs up at the time the relation is entered into, and is consummated when the surety has paid the debt."

This doctrine, that the right of subrogation is founded upon principles of natural justice, without regard to form, is reiterated, again and again, in the course of the opinion, to which, at full length, I invite the attention of the Court. The opinion refers to what Lord Chancellor Hardwicke said, in *ex parte* Crisp, 1 Atkyns, 183, "that where the surety paid off a debt, he was entitled to have from the creditor an assignment of the security to enable him to obtain satisfaction for what he had paid."

I submit to the court, that the principle of natural justice upon which the right of subrogation rests, in all the cases, is the same principle from which, in the equitable action of *indebitatus assumpsit*, at common law, the promise is implied which is made the foundation of the action.

In Hoover *vs.* Epler, 52 Penn. St. Rep., 522, the court say:

"The right to subrogation is founded in equity and benevolence, and not necessarily upon either privity or contract between the parties."

In Eaton *vs.* Hasty, 6 Nebraska, 425, the court say:

"The right to subrogation does not depend *on contract*, but on *equity*, and it depends on *facts* to develop and determine it."

I do not think that the courts mean to lay down strictly, that pure benevolence can be administered by a court of justice, or

that they will enforce moral obligation, or natural justice, independently of equitable obligations, arising from natural justice, recognized as such by courts of equity. All they mean is that no contract, express or implied, enforceable at law, and no *express* equitable contract is necessary, but that the courts will deduce from the facts an equitable promise, or equitable obligation, founded upon natural justice, which they will enforce. This is what Lord Brougham means, when he speaks of equity importing a contract into the transaction.

I might continue to cite cases of the same purport until your Honors would be weary indeed, but I forbear. Suffice it to say, I have not been able to find any case in which contract has been held *necessary* to create the right of subrogation, except so far as contract is always implied in the relations of men dealing with each other, as debtors or creditors. In equity, it seems to be assumed that, in all the varied relations of men, dealing with each other, in matters of business, there is an implied obligation *to do right*, which is stronger than any form of words, oral or written.

I shall now assume that the right of subrogation rests upon principles of natural justice, independent of contract, except so far as, in the words of Lord Brougham, equity, imported into the transaction, may be said to raise a contract. While so assuming, I shall not deny, that the right of subrogation *may* also rest upon *express* contract, as in the case of the *express* assignment of a debt in which case, it is called *conventional* subrogation.

The only remaining question, upon this demurrer, is whether the facts, alleged in this bill, bring the plaintiff's case within the principles upon which pure subrogation rests. In other words is the plaintiff entitled to it, upon principles of natural justice?

This brings us to the question, what is natural justice? What can it be but the universal sentiment of mankind, that a debtor should pay his debts. The maxim, ***constans et perpetua voluntas suum cuique tribuendi est jus***, expresses the universal sentiment of the human race, in all nations, and in all ages. It is from this universal sentiment, implanted in the bosom of mankind, by their Great Creator, that the obligation, arising from the relation of debtor and creditor, derives all its force. Pay me what thou owest is natural law. It is the voice of mankind.

Thus far, *theoretically*, there is no issue between the plaintiff and the defendant. The debt is not denied. The defendant contracted it, by authority of law, and became bound, by the same authority, to pay it. This the defendant does not deny, but hitherto has refused to pay it, except in worthless bonds, which it alleges, in the brief of its counsel in this cause, constitute a legal bar.

But the plaintiff is not the original creditor. We must, therefore, go a step further, and show how this principle of natural justice invests us with a title to the debt. In other words, we have to show, on what principles of natural justice, our right of subrogation rests. This right results from the same law of nature from which the right of property and the right of alienation of property are derived. It is by force of natural law, that one may not only enjoy what belongs to him, but may transfer it to others. Acting upon this principle, this railroad company attempted to transfer to us this debt. If there had been an assignment to us in writing, there would have been a conventional subrogation, which would authorize us to proceed at law in the name of the railroad company, or in equity, in our own name. But there being no such assignment, we must have recourse to the principles of natural justice, on which the right of subrogation *pure* rests. Upon these principles, by the payment of our money we became, in equity, creditors of the town, and the same natural justice, which before required the town to pay the debt to the railroad company, then required them to pay it to us. By reason of the sale to us, the right of the railroad company to demand this debt of the town ceased, and if we did not acquire title to it, legal, or equitable, then the town became forever discharged from it, and that, for no other reason, than the issue of unauthorized bonds. It is simply puerile to say, that the acceptance of void bonds, by the railrord company, canceled the debt, or that the transfer of the bonds to us, affected our right to recover it from the town. It was not the *paper*, on which the bonds were written, that the railroad company intended to sell, or that we intended to buy. It was the debt itself, evidenced by the bonds, as negotiable instruments, transferable by delivery, and actionable in themselves. It is just because the delivery of the bonds to us did not invest us with a title at law, to recover the debt from the town, that equity relieves us by giving effect to our title, upon principles of natural justice.

It is vain to say, that the town was no party to the transaction, and that no relation, of any kind, existed between us and the town, previous to the purchase of the bonds, and that therefore we were *volunteers*. The transaction itself refutes this claim. The railroad company had a perfect right to dispose of its own property, without asking leave of the town, and we had a perfect right to buy it, without the permission of the debtor. Your Honors will recollect that, in Matthews *vs.* Aiken, New York Court of Appeals, before cited, it was held, that a guarantor, who became such, not at the instance of the debtor, was not a *volunteer*, and was entitled to subrogation, upon principles of natural justice and equity, those high grounds upon which, in the language of Lord Brougham, the right of subrogation rests.

Assuredly, if a *guarantor* of a debt, becoming such at the instance of the creditor, be not precluded from the right of subrogation, neither is a *purchaser* of a debt, like this plaintiff. No difference, *in principle*, between the two cases, can be discerned.

Let us appeal to the sentiments of justice implanted, by Nature's God, in every human being. Let us state our case to the great tribunal of the world. Do your Honors believe, that one man, one woman, or one child, understanding the facts of the case, would cast a vote for the dismissal of our bill?

Let us go to the courts of equity, throughout the civilized world, wherever courts of equity exist, and consult their records. I appeal to the knowledge of your Honors. No case can be found, upon the authority of which, the subrogation, demanded in our bill, can be denied. On the contrary, it is held, that the right to subrogation can hardly be placed on too high ground, that when the law fails, it is the special office of subrogation, upon principles of natural justice, to bring to their senses, men who deny their natural obligations, and manifest to the world, that they are not governed by the universally recognized principles of common honesty. By the uniform current of the decisions of courts of equity, subrogation, upon principles of natural justice, is designed for just such cases as this.

No contract is necessary. The party subrogated may be entitled to rights and securities even, of which the parties were *ignorant*. No relation of any kind, between the party subrogated and the debtor need exist. All that is required is that, that party should have paid his money, *in good faith*, under circum-

stances which show that he did not pay it as a volunteer. Ordinarily, the relation of the party subrogated is that of a guarantor of the debt which he has paid. In this case, it is that of a purchaser of the debt.

This case, I submit to your Honors, furnishes one of the finest examples of the beneficent power of a court of equity to administer natural justice. Before such a court, in such a cause, we may summon every man's conscience to bear testimony in our behalf. The universal conscience of mankind may, perhaps, prove to strong even for the municipal repudiators of the great State of Illinois.

My esteemed friends and associates, Messrs. Bailey & Sedgwick, in their able and elaborate Brief, have so completely answered the argument of the learned solicitor of the defendant, and so completely covered all the points of the case by the citation of authorities, which, the Courts of the United States, sitting in Illinois, will not disregard, that I forbear to proceed further.

The question, whether the debt of the town, to which the plaintiff is subrogated, is the original debt, created by the vote of the town, at the polls, or whether it was modified by the delivery and acceptance of the bonds, so as to become payable in installments, with interest, according to the tenor of the bonds, presented in the bill by an alternative statement, does not arise upon this demurrer. The discussion of this question is, therefore, reserved for some future occasion.

Francis Fellowes

124-137

IN THE

Supreme Court of the United States.

October Term, A. D. 1887.

No. 1134.

The Ætna Life Ins. Co. v. The Town of Middleport, et al. } Appeal from the U. S. Circuit Court for the Northern District of Ill.

No. 1135.

The Ætna Life Ins. Co. v. The Town of Belmont, et al } Appeal from the U. S. Circuit Court for the Northern District of Illinois.

No. 1136.

The Ætna Life Ins. Co. v. The Town of Milford, et al } Appeal from the U.S. Circuit Court for the Northern District of Illinois.

BRIEF AND ARGUMENT OF R. DOYLE,

SOLICITOR FOR APPELLEE.

In Supreme Court
OF THE UNITED STATES.

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The Ætna Life Ins. Co. v. The Town of Milford, et al } Appeal from the U.S. Circuit Court for the Northern District of Illinois.

Brief and argument for the appellees.

STATEMENT.

There is no substantial difference in the facts aileged in the bills of each of the three cases, and such being the case we will argue them as one, and ask that our argument and citation of authorities apply to all alike.

March 7, 1867 the legislature of the State of Illinois passed an act found in Volume 1, Private Laws of 1867, page 842, authorizing townships located as appellees were, to appropriate such sums of money as they should deem proper to aid in the construction of the Chicago, Danville, & Vincennes R. R. to be paid by the levy and collection of a tax levied by the authorities of such townships, as soon as the road was built through such township, providing the proposition to make such appropriation be submitted to a vote of the legal voters of such township at a regular or special meeting, and the sanction of such voters obtained thereto.

In 1867 and 1868 each of said appellees were acting under the township organization law of Illinois and in that year under said act of 1867 (Middleport on June 8) submitted the proposition to the legal voters of such townships, to levy and collect a tax of $15,000 on the property of the inhabitants thereof to aid in building said railroad, provided Watseka be made a point on railroad, which proposition carried and was so declared and duly attested by the clerk and moderator, and by the clerk recorded on the records of town. That about the time of making the appropriation the supervisor on a book kept for that purpose by the railroad company, entered said appropriation thereon. That the railroad company relying on the faith thereof built in 1871 its road through said township in accordance with the condition. That February 26, 1869, the Legislature of Illinois for the purpose of ratifying and confirming the appropriations, passed an act found in Volume 3 page 355 and also the act of March 24, 1869, in Volume 3 page 365 for the same purpose.

That Febuary 10, 1871, Board of Auditors of Middleport met and adopted the following resolution.

WHEREAS, An appropriation of $15,000 was June 8, 1867, voted to said railroad, company and the township is not able to pay it, therefore, Resolved, That bonds be issued to said railroad company for $15,000 and enough more to-wit; $1,500 to cover discounts; bonds dated February 20, 1871 and bear 10 per cent interest from date, which resolution was duly recorded in town records.

That in pursuance of resolution the supervisor and clerk, March 25, 1871, executed fifteen bonds of $1,000 each, dated on that day at 10 per cent with coupons attached, due June 1st annually. Said bonds were to be delivered to the railroad company when condition of vote was fulfilled at 90 cents on the dollar.

That April 1, 1871, Board of Auditors again convened and adopted a resolution setting out vote of June 8, 1867 aforesaid and issue of bonds and sale to railroad company at 90 cents on the dollar, and that a tax had been levied and collected to pay balance which supervisor then held, and which he was then instructed to pay over to the railroad company when it was completed to Watseka: which resolution was duly recorded on the town records.

That said town has frequently recognized the validity of said bonds by levying a tax to pay the interest thereon and paid same to July 1, 1876. That the railroad company accepted the bonds in lieu of the debt and put them in the market for sale, and appellant in 1871 bought said bonds for $14,700.

That June 26, 1876, a bill was filed by said townships

against appellant to have said bonds declared void, and in September 1876 said bonds were declared void and appellants enjoined from collecting.

That appellant has held said bonds since its purchase aforesaid and said decrees still remain in force in each of said cases. The bond which is made a part of the bill in the Middleport case contains the assertion that it is issued under and by virtue of all of the three acts above recited, and in accordance with a vote of the electors at a special meeting held June 8, 1867.

The bond of the town of Belmont only recites the act of 1867 and votes of the electors June 10, 1867, and June 2, 1868 in pursuance of said act, also under and by virtue of the laws of February 26, 1869, and bears date March 23, 1871, but not to bear interest till July 1, 1871, and annually thereafter.

The bond of the town of Milford recites act of 1867 and votes of the electors May 14, 1867, and July 16, 1868, in accordance with said act, also issued, under and by virtue of the laws of February 26, 1869. Bonds dated March 31, 1871, interest payable July 1 annually.

Under the above facts the appellant claims in each of the three cases to be the equitable assignee of the railroad company of the debt or claim due from the townships respectively, and to be thus subrogated to its rights against said townships.

To this claim of the appellant on the part of the townships we set up the following:

First. We deny the right of subrogation.

Second. We set up the statutes of limitations of five years.

Third. We claim the former decree is *res adjudicata*.

Appellant is not entitled under the facts in these cases, to be subrogated in equity to the rights of the railroad company.

Was appellant when it bought the bonds in the market in June 1871 in any way under *obligations* to buy said bonds, or was it done by it merely as an investment and as any one would buy commercial paper?

We say it was under *no obligations* legal or equitable to buy them, but was a mere *volunteer or stranger* to the appellees, and at that time parted with its money voluntarily and could if it so chose imposed any terms it saw fit on said railroad company before purchasing said bonds as regards security, and which would have been acquiesced in by the railroad company. In such case there is no subrogation as all the authorities show, even those cited by appellant.

In their argument counsel for appellant seem not to have taken any distinction between equitable subrogation pure and simple, and conventional subrogation which arises on account of some agreement between the parties by which the party is given the rights of another to hold some security that was held by such other persons. In fact all or nearly all the authorities cited by them are of the latter class as we will show on examination, and can have no application as it is not pretended any agreement was made by the railroad company appellant should have such a right, except what can be inferred in law that is an equitable one as distinguished from conventional or they

are cases where an action at law lies and so decided by the courts.

We will examine a few of the authorities cited by them and see how they apply to the cases at bar so far as subrogation is concerned.

In Hodgson v. Shaw, 3 M. & K., 183, which was a case where A. & B. executed a joint and several bond to W. for a loan of money, none of the money being paid before the death of A. and W. but after their deaths the executors of W. obtained from B., as principal, and C. as security, another bond to secure the payment of the sum due on the first one, after the death of C. the second bond was paid out of his estate and the original bond was *assigned* to his administrator. It was held by the court of equity that the claim under above facts was a good and valid one in specialty creditor of A's estate in favor of the estate of C. to the extent of the penalty in the original bond, and as *assignee* of the first bond the paying off of the second not in the least affecting the first bond. This was clearly a right of subrogation of a surety that was bound to pay, to the rights of his creditors, who had put him in his shoes by *actual* assignment of the first bond and was not in any sense of the word an equitable subrogation.

In Goldsmith v. Stewart, et al, 45 Ark., 154, which was a suit by Goldsmith against the County Clerk and several boards of directors of school districts, to reform orders given by former boards, which orders had under a subsequent law been delivered up for cancellation to the County Clerk and others in lieu thereof issued by him, which had been by the parties to whom issued assigned

to Goldsmith, and after that the courts had decreed this reissue void, as the act under which issued was unconstitutional and in passing on that kind of a case the court held that the original orders should be reissued of the original dates they bore and by the same parties and show on their faces for what issued, and then if the statute of limitations ran against them it would be the misfortune of the party and for which no remedy would exist. This case is not at all like the one at bar because there are no issues to be had of other bonds in lieu of those declared invalid and all the claim the railroad company could have against the towns as held by Judge Blodgett was an action of debt or assumpsit after they had performed the conditions, and as such if appellants are entitled to it at all an action at law will lie in name of the railroad company for its use.

In the case of *Fortescue v. Barnett*, *3 M. & K.*, *43* star paging which was simply a question of whether there was a legal assignment to trustees for the benefit of third persons, and no question of subrogation in any sense of the term. The Master of the Rolls in passing on that question says "The question does not here turn upon any distinction between a legal and equitable title, but simply upon whether any act remained to be done by the grantor which to assist a *volunteer* this court would not compel him to do. I am of the opinion no act remained to be done to complete the title of the trustees."

In that case the deed of the assignment had been delivered to one of the trustees, but the policy remained in the hands of the assignor and he subsequently for a consideration surrendered the policy to the company, the trustees to whom the assignment was delivered having failed to

notify the company thereof, on bill filed by the surviving trustee it was held the assignment was complete by the delivery of the deed, and the assignor was liable for value of the policy to *cestuis que trusts*, thus showing a clear case of *contract* and not of equitable subrogation. And the cases cited of *Sye Dubert ex parte 18 Ves. 150* is to the same effect that when the assignment is complete though voluntary *the court* will act for *cestue que trust.* These are cases of *express* contract.

In *Morgan v. Hammett. et al*, 23 *Wis.* 41, it appears that all the rights of Morgan arose from direct contract and with parties who had a right to make such contracts, and therefore you could not claim that it is an equitable right of subrogation because the debts represented were those of intestate and the agreement was at the time *believed* to be made with a party who was the *sole* heir and so *represented* herself, to the party advancing the money and really gave him a mortgage to secure him, and the party Prideaux holding the prior mortgage agreed to assign it to him but instead thereof executed a satisfaction piece by *mistake* but did deliver over the notes and mortgage as security, and the money advanced by the party went to pay debts of decedent. Under all the circumstances this if subrogation at all, was not by virtue of a bare equity but of a *contract*, and is not at all analogous to the standing of appellant in cases at bar where it is dealing with municipal corporations. If by this they intend it for an authority for an equitable subrogation on an administrator's sale it is of no value in this state as will be seen by the *69 Ill. 433* hereafter cited.

In Furnold v. Bank of State of Mo. 44 *Mo.* 433,

was where A. borrowed from the Bank a sum of money and gave his note with B. C. and D. as sureties. A then died and the claim was proven up against his estate which paid part of the claim. Suit was then brought against the sureties by the Bank for the balance, and a judgment recovered against them. B. one of the sureties, after the judgment, sold the land he owned to Fernold and some time thereafter the bank levied on the land, and to save it he was compelled to pay the debt and filed a bill against the bank and the other sureties to compel the bank to assign its judgment against the estate of A. to him, and all other sureties it had from A. to secure the debt, and also compel the sureties to pay their share of the judgment against them, and his grantor, which the court on final hearing held he was entitled to. This is clearly a case where a party was *compelled* for the protection of himself to pay off a debt, and in all such instances when the debt is that of another he is entitled as a matter of equity to step into the shoes of the creditor. But can this be held to be the case at bar? We clearly think not as the appellant in all of these cases was nothing more or less than a volunteer there being no duty of payment on its part.

In *Talbot et al, v. Wilkins et al*, 31 *Ark.*, 421 was a case where Wilkins, Bell and Holcombe were sureties for Cobb to Tillar for $2,500. Before note fell due Cobb sold out his stock of goods to Talbot and Holcombe who as part of the purchase agreed to pay the note to Tillar. When note became due Tillar brought suit thereon and obtained judgment and collected from Wilkin and Bell $2,025.66 their share as sureties aforesaid and they filed their complaint to be substituted to Tillar,s rights. It was in passing on the question under the above facts the court says

"Subrogation is the equity by which a person who is secondarily liable for a debt and has paid the same is put in the place of the creditor, so as to entitle him to make use of all the securities and remedies possessed by the creditor in order to enforce the right of exoneration as against the principal debtor, or of contribution from others who are in the same rank with himself and this is not founded on contract but the general principles of equity * * * *

It has accordingly been held and must be considered to be the generally received doctrine that a surety who pays a debt which has been reduced to a judgment, is entitled to have the judgment kept alive for his benefit and to enjoy as against the principal debtor, exactly the same advantages which could have been claimed by the judgment creditor. 422. * * * * *

We think if Tillar might by suit have compelled the defendants on their agreement with Cobb to pay the note plaintiffs having paid it to Tillar have clearly the rights to be subrogated to him; and it is well settled where the promise is made to one for the benefit of another he for whose benefit it is made may sue in his own name 423."

Under all the facts we think this Arkansas case is strongly against appellants as it was never compelled to pay a single cent for any of the towns but all of its acts were those of a mere volunteer and for the purpose of an investment to make money and to increase its capital, and no question of equitable subrogation arises.

In *Carpenter v. Brenham*, 40 *Cal.* 239, which was a case by a junior mortgagee to foreclose a mortgage on premises against which a prior mortgage was foreclosed

and the premises sold, and the purchasers at a foreclosure sale of a first mortgage to which suit a junior mortgagee was not a party had purchased the premises for less than the mortgage debt, and subsequently released the mortgagor from the balance of said debt and said purchaser subsequently sold to sundry parties parts of said land, and in the meantime the junior mortgagee released the mortgagor from all liability on the mortgage debt so far as outside property is concerned, and then filed a bill to foreclose making all the above persons parties who, came in and set up as a defense that as the mortgagor has been released as above by the junior mortgagee, if they paid off the junior mortgage they would not be entitled to the claim on his outside property as it had been released and they as a matter of right when they paid off such junior mortgage were entitled to be subrogated to all the rights of the junior mortgagee.

The court in passing on that question say "The purchaser at a foreclosure sale sustains a two fold relation to the junior mortgagee:

First as having acquired the legal title of mortgagor.

Second as having become in equity the assignee of debt or at the least so much as was satisfied by the foreclosure. In either capacity it they should discharge the debt secured by the junior mortgage the most they could claim if entitled to any relief of that character would be the right to be subrogated to such rights as the junior mortgagee had at the time of payment. As assignees in equity of the debt secured by the prior mortgage they would be under *no obligation* to discharge the junior one to protect their rights and therefore if they *voluntarily* discharged it they

would simply be removing an incumbrance which could not effect or impair their rights as assignee of prior debt, and subrogation is only allowed as a matter of right in those cases where a party is *forced* to do so to *protect* his own rights.

Now this case, if it has any application to those at bar in the question of subrogation, is against appellants as it, at the time of the payment of the money, had no rights of any kind to protect, and for the protection of which it was forced to part with its money to the railroad company for these bonds.

In *Mosier's Appeal* 56 *Pa. St.* 80, the court says, in speaking of subrogation, "It will not arise in favor of a *stranger*, but only in favor of a party, who, on some sort of *compulsion*, discharges a demand against a common debtor. For instance, a surety, who pays the debt of his principal, or when one of several joint sureties has paid the whole debt.

The principle does *not apply* in favor of *volunteers*. They can obtain the right of substitution only by *contract*. I regard the doctrine as applicable in all cases where a payment has been made under a legitimate and fair effort to *protect* the ascertained interests of the party paying, and when intervening rights are not legally jeopardized, or defeated."

Now, can it, for a moment, be held that the appellant, when it made the payment to the railroad company, as alleged for the bonds, did so for the purpose of paying the debt of the township, and for the purpose of protecting the interests of the appellant? We answer no.

most emphatically, because it says in its bill and brief that this was not thought of till after the decision of the Middleport case, in Ill. 82, 562, and all its acts clearly shown, it was a mere volunteer in buying said bonds, and did it for an investment, and not to protect the rights of, or pay the debts of any one.

In Hoover v. Epler, 52 *Pa.*, 524, the court says, "Subrogation is founded on principles of equity and benevolence, and may be decreed where no contract exists between the parties, but not in favor of a mere volunteer, who, without any *duty*, or obligation, moral or otherwise, pays the debt of another, and the rule is that the party whose rights are claimed to be used, must be fully satisfied before an equity will arise in favor of the party claiming to use them.

Now, in the cases at bar, what duty or obligation of any kind, legal or moral, had the appellant at the time it parted with its money to the railroad company for the bonds of the defendant towns, to pay the debts of towns to said railroad company? Clearly none, and the mere statement of the proposition shows it was a mere volunteer in those matters, and no right of subrogation under these Pa. authorities cited by appellant exists.

These are some, and the principal, of the authorities cited by them on the question of subrogation, and on a careful examination of them, it will be seen they do not apply to the facts in any of the cases at bar from which any right to subrogation could be claimed.

We now call your Honor's attention to some other authorities, which clearly show as there was no contract,

that appellant should be subrogated to the rights of the railroad company, and it bought said bonds merely as an investment, and did not think of said rights at the time, and not till long after the bonds were declared void it is a stranger and volunteer.

The right is a creation of the civil law, and as expounded in Lousiana, where the law is still in force, is as follows:

A party buying, at an execution sale, the title to which fails, is not subrogated to the rights of the judgment credited as in such case, there is no legal subrogation. *Cheldress v. Allen, 3 La., 377.*

Again, "We are ignorant of any law, which gives the party, who furnishes the money for the payment of debt, the rights of a creditor, who is thus paid. The legal title alone belong, not to all who pay a debt, but only to him, who being *bound* for it discharges it."

Nolte & Co. v. Their Creditors, 9 Martin, 602.

Curtis v. Kitchen, 8 Martin, 706.

Cox v. Baldwin, 1 Miller (La.) 147.

"It is only in cases where a party paying stands in the relation of *surety*, or is *compelled* to pay in order to protect his own interests, or in virtue of legal process, that equity substitutes him in place of creditor, as a matter of course, *without* any special agreement. A stranger paying the debt of another, will not be subrogated to the creditor's rights in the absence of an *agreement* to that effect.

The position of complainant is that of an ordinary vendee at a sheriff's sale, and nothing more. Indeed, nothing in the case in any degree tends to show that the

protection of his interest required, or even *induced* the purchase. He bought the land and paid for it voluntarily. We must therefore hold that the amount which he paid the sheriff operated as a discharge *pro tanto* of the creditor's judgment, and that judgment being thus satisfied, there could be no substitution.

Richmond v. Marston, 15 Ind., 173.
Peet v. Beers, 4 Ind., 48.
Bardin v. Walpole, 38 Ind., 146,
McClure v. Andrews, 68 Ind., 100

This case in 15 Ind., 173, was affirmed in the case of *Spray v. Rodman, 48 Ind.*, 228, where the court use this language, "Subrogation is where a man pays a debt, which could not properly be called his own, but which it was his interest to pay, or which he might have been *compelled* to pay *for another* in which case the law subrogates him in all the rights of his creditor," and as Spray had, at a particular sale of land, bought the whole of the land without any notice of any prior liens, and there being two judgments against one of the parties in the partition proceeding, and he having been compelled to pay said judgments, was allowed to have the judgment creditor's lien on the money then in court in lieu of the land.

In Bishop, et al v. O'Connor, et al, 69 Ill., 433, which was a suit, by Bishop, to be subrogated to the rights of the creditors of Charles O'Connor, the lands of whose estate had been sold to pay said debts; and the money used for the purpose, and also for the use of the heirs, said heirs having had said sale set aside as void. In passing on the question, the Supreme Court hold the doctrine of *Caveat Emptor* in its broadest sense applies to the purchases, and although his money was used to pay the debt of decedent,

and for the support of the heirs, no right to subrogation exists, and that it cannot be extended to the class of cases without going beyond the well recognized rules of equity, and they examine very many cases, and show wherein they differ from this, and among the others the case of *Kinney v. Knoebel* 51 *Ill.*, 112, and say that was a case where the heirs filed a bill to set aside the sales and to redeem, and it further appeared Morrison only *agreed* to buy, if he could control and *use the debts for paying* his bid, and he so made the *arrangement*, and they allowed a subrogation on the principle that he that seeks equity must do equity, 'and of or on account of the *agreement* aforesaid, thus showing a distinction between the administrators sale, which is similar to the execution sale, and the execution sale to Morrison.

The case in 69 Ill., 433, shows that no right of equitable subrogation will be given to a vendee at a sale made by an officer of the law, but that *caveat emptor* applies to all such sales, thus following the La. and Ind. cases on on that question, although you can find *dicta* the other way, in the 88 Ill., 359, but when you examine the case you will see that the Supreme Court deny the party the right of subrogation and dismiss the bill, and the case in 106 Ill., cited by appellant in *dicta* in a law case, but the case above in 69 Ill., is a well considered case, and well supported by authority and reason. If such were not the case, what good would the rule of *caveat emptor* be?

This is to sales where the debt is paid by act of law, and you could not call the party a volunteer in the sense of appellant in these purchases.

In *Suppiger v. Garrells*, 20 *Brad.* 629, which was a

suit where a party claimed he paid a note because he was liable therefore, but it nowhere appeared *how* he was liable and it also appeared he did not pay two other notes that were exactly in the same condition, and to which he bore the same relation. The court held him a mere volunteer, and in passing on the question say, "A mere stranger or volunteer cannot, by paying a debt for which another is bound, be subrogated to the creditor's rights in respect to the security given by the real debtor. A *stranger*, within the meaning of this rule, is not necessarily one who has nothing to do with the transaction, out of which the debt grew, but *anyone*, being under no *legal* obligation or liability *to pay* the debt is a *stranger*, and if he pays the debt a mere volunteer." Citing.

Young v. Morgan, 89 *Ill.*, 203.
Beaver v. Slanker, 94 *Ill.*, 175:
Bishop et al. v. O'Connor et al. 69 *Ill.*, 431.

In *Shinn v. Budd* 14 *N. J. Eq.* 236, which was a case where C. gave a mortgage to H. in July, 1852, to secure $225, which mortgage was assigned to Fort. C. died in March, 1856, and letters were granted to Shinn, who on the personal estate being insufficient, applied for and obtained an order to sell the land to pay debts, no reference being made in any of the proceedings, about the mortgage. Under this order the land was sold to J. for $365.52, its full value. March 13, 1857, S. the administrator, paid to F. balance due on the mortgage, $112, and took his receipt therefor on back of bond, and then filed his bill to be subrogated to the rights of F., setting up the mortgage was paid out of his own funds and not as administrators. Under these facts held "that subrogation is never applied to aid a *volunteer*. Legal substitution into

the rights of a creditor for the benefit of a third person takes place only for his benefit, who being himself a creditor, satisfied the lien of a prior creditor, or for the benefit of a purchaser, who extinguishes the incumbrance upon his estate, or a coobligor, who discharges a debt, or of an heir, who pays the debt of succession."

In *Sanford v. Mc Lean, 3 Paige, 122, Ch.* Walworth says, "It is only in cases where a person advances money to pay the debt of a third person stands in the situation of a surety, or is *compelled* to pay it to *protect* his own rights, that a court of equity substitutes him in the place of the creditor, *as a matter of course* without any *agreement* to that effect.

In other cases the demand of the creditor, which is paid with the money of a third person, and without any agreement that the surety shall be assigned, or kept on foot for the benefit of such third person is absolutely extinguished."

The same doctrine will be found to be maintained in numerous other cases in the American Courts citing authorities.

And the court denied the right of Shinn to be subrogated to the mortgage of Fort, 239.

Chief Justice Marshall said in *Bank of U. S. v. Winston Ex.* "If a security, not assigable, be discharged by a surety whom it binds, equity keeps it in force in his favor, and puts such surety in place of the original creditor. But I think there is no case in which this has been done in favor of a person not *bound* by the original security, who discharges the debt as a volunteer.

In *Kitchen v. Mudgett*, 37 *Mich.*, 85, where Kitchen had paid off three prior mortgages for Mudgett to Gilbert & Phibbs, and to secure himself took another mortgage on the land, but when she did so there was a mortgage on the land to Mrs. Mudgett, which was not paid or released. Under these facts, court held she was not subrogated to the rights of Gilbert & Phibbs under their mortgages, but they were to be considered as paid off, and as Mrs. Mudgett had not consented to waive her property, and was not guilty of any fraud or deception, the Kitchen mortgage must be held subject to hers.

In *Gadsden v. Brown and Wellsmen Speers. Eq., 41*, the facts in that case were, that G. agreed to advance $5.000 for Carroll to aid in satisfying a bond and mortgage to a Pinckney, and when he did so he took from Carroll a bond and mortgage on 11 slaves to secure it, and on this bond C. Confessed a judgment in favor of G. The query is, under these circumstances, is G. entitled to be subrogated to the rights of Pinckney and Burbadge to the bond and mortgage held by them on 34 slaves, to secure their debt to the extent to which the $5,000 extinguished it? On above facts, Ch. Johnson says citing

Story's Eq. 477—8—589, et seq.

"The doctrine of subrogation is a pure, unmixed equity, having its foundation in the principles of natural justice, and from its very nature could never have been intended for the relief of those, who were in a condition in which they were at liberty to elect, whether they would or would not be bound, and so far as I have been able to learn its history, it has never been so applied. If one, with a perfect knowledge of all the *facts*, will part with his money, or bind himself by his contract in a sufficient consideration,

any rule of law that would restore him his money, or absolve him from his contract, would subvert the rules of social order. It has been directed, in its application, exclusively to the relief of those that were *already bound*, who could not but choose to abide the penalty. But I have seen no case, and none has been referred to in the argument, in which a *stranger*, who was in a condition to make terms for *himself*, and demand any security he might require, has been protected by the principle."

"Subrogation by operation of law (which is what is claimed by appellant,) exists in favor, not of all who pay the debt of another, but *only* in favor of those, who being *bound* for it, have therefore discharged it. It is a well settled rule of law, no one can obtrude himself upon another as his surety, if one *voluntarily* pay the debt of anotner, *without* any agreement to that effect with the debtor, he cannot take the place of the creditor, or recover the money so paid, of the debtor."

Sheldon on Subrogation. Sec. 241 and authorities cited.

The foregoing is a clear and succinct statement of the law, and is fully supported by the foregoing authorities in this and many other states, and from the facts as alleged in said bills, show appellant has no legal right to claim to be subrogated to the rights of the railroad company; but in the matter of buying said bonds was a mere volunteer, and could have made terms.

In these cases the real, true position to put appellant in, is the one it was intended at the time of the contract by the parties thereto, that is when the money was paid for and the bonds delivered. Now, what was then intended by the appellant and the railroad company? Did they intend

to buy, and company sell an *account* against the appellee towns? No, most certainly not, as they aver they knew nothing of this right till *after* the decision of the Supreme Court of the State of Illinois, in 1875, and, in fact, not till long after, as the fact was not set up in the case when remanded for trial. In fact, the first we heard of it was when bills were filed, May 27, 1886.

In *Otis et al, v. Cullum Receiver, 92 U. S., 448*, which was sent to recover the value of bonds issued by Topeka, Kansas, after they had been declared void by the courts, as issued, without authority, against the party selling them, on the grounds of a failure of consideration; the court says, "The plaintiff got exactly what he *intended* to buy, and *did* buy, such securities throng the channels of commerce which they are made to seek, and where they find their market. They pass from hand to hand like bank notes." *Citing authorities.*

Appellant cites *Meyer v. Mintoyne, 106 Ill.. 414*, to sustain them in the right of subrogation. That being an action of ejectment, no such question is at issue, but the reason of the court sustains the case in the *92 U. S.*, 448. We contend they never bought any account against these towns, but the bonds and them alone, and in the case in 106 *Ill.*, 424, the court, in speaking of the payment of the redemption money, paid by the party when it was claimed it operated as an assignment of his certificate of purchase, say, "It is clear no such thing was ever *intended* by the parties, but the very contrary. The object in paying and receiving the money was to extinguish the title under the previous sale, and to now hold these facts amounted to an assignment of the certificate would be to make a contract

for the parties they never *intended*, and which in all probability was never *thought* of till after the fatal defect in appellant's title was discovered, would be to set at defiance all rules and principles, which ordinarily govern courts in determining whether a contract does or does not exist under a given state of facts."

To the same effect is the case of *Lambert v. Heath.*, 15 *M. & W.* 486, where defendant bought for plaintiff certificates of Kentish railway scrip, which the directors of the railroad company afterwards repudiated and then an action for money had and received, was brought on account of the failure of consideration. Court in passing on the question says, "The only question was, what the party bought Kentish railroad scripp. It was signed by the secretary of the company, and was the only Kentish railway scrip on the market, and one person chooses to sell and another to buy, then the latter has received all he contracted for."

It seems to us these cases, when taken in connection with the facts of the cases at the bar, are very applicable. The appellant seeking for an investment, sought such markets as the bonds of the townships were placed in for sale by the railroad company, which company had not the least connection with the towns, and could not in any way claim to be the agent thereof, and having found such securities bought them from the company, or its assigns (as you cannot teil which, by the allegations in the bill) at the price agreed on, and bonds were delivered to appellant it not being intended, at that time, by appellant, to buy, or railroad company to sell an account against the towns in favor of the railroad company, but simply to buy the bonds.

As has been well said by this court, and those of Eng. and Ill., this is not what the appellant *intended* to buy when it paid for and recevied the bonds, but the bonds, *only*, were the only things it bought, or *intended* to buy, and received just what it bought, and now asks the court to say it bought something else, thus making a new contract between the parties. This we do not believe will ever be done. This view of the case is made to appear more strongly from its bill and brief when it says in reply to our position that it should be estopped for not setting up such facts in the former case. "We did not know at that time that we had any such equity. We *could* not know about that until the final decision of that case supposing, as we did all through the case, that the bonds were valid." They not only did not get their thinking cap on then, but failed for ten years to adjust it in this shape, clearly showing that it was an after-thought, and from above authorities not allowable at this late day.

There is another class of cases cited by appellant, which they claim are cases of subrogation, but which on examination will be found to be of that class where the parties contracting have the right to in the time and manner they did, but not in the practical *form* in which the contract was worded on account of some statute to the contrary, and in such cases where the obligee or payee is *not* in *pari delicto* he can recover the money advanced under the common counts for money had and received.

The case of *Curtis et al. v. Leavett*, 15 *N. Y.*, 93, was where a bank in Philadelphia had loaned money to a company in N. Y., and to secure it had taken a form of obligation that was prohibited by the N. Y. satute, of which the Philadelphia Bank was ignorant, it being a

foreign law, hence was an innocent purchaser. The court in passing on this question says, "The acts of the Philadelphia Bank were legal, and were innocent investors of their money, and contracted with a party who had a *right* to make *time* loans, but the particular *kind* of notes given to secure the loans were, according to the N. Y. statute, illegal.

"It was lawful for the banks to lend, and for this company to borrow it, and to engage either verbally or in writing to pay it at the *times* agreed on. The only thing unlawful, then, about the transaction was the particular *form* in which the engagement was given. Can the corporation on this ground repudiate the whole contract, keep the money and recover back the pledge? And citing 4 Kern, 162, the court on 94 say, "We certainly did not say that the guilty violator of the law could take advantage of his own wrong, and disaffirm at his election, not only the notes, but the contract in all its parts." And on page 96 the court says, "If the contract is void in *all* its parts then it is true there is nothing but an *implied* assumption left." On page 98 they say. "The illegal contract was not the loan, for the plaintiffs had the *right* to loan the money tothe defendants."

In *Oneida Bank, v. Ontario Bank*, 21 *N. Y., 496*, which was an action on a void bill, it was held that the party could reject the security and recover the money he had advanced on receiving the void bill, under the counts, for money had and received, the party attempting to recover not being in *pari delicto*, and if he were, no recovery could be had, citing

Tracy v. Tallmadge, 14 *N. Y., 162.*
Curtis v. Leavett. 15 *N. Y. 99.*
Sackett Harbor Bank v. Codd, 18 *N. Y. 240.*

Now, although these cases are not those of equitable subrogation, you will see when compared with the facts in cases at bar, they are all against appellant.

It was dealing with a municipal corporation, all the powers of which were clearly set out in public statutes, and which it was *bound* to take notice of, besides the very *time* of holding the elections were set out in the bond, and the law of 1867 under which all of them were held, and by that law, as well as the authority granted by the electors at the polls, all rights the officers of the towns had was to levy and collect a tax to meet said appropriation, and no authority of any kind was allowed by that law or any other law in Illinois under such an election, to issue *time* obligations that would be binding on said towns. Therefore, we say, the appellant was not, under the circumstances, an innocent holder or purchaser, but as the above authorities hold, was in *pari delicto* and consequently no recovery could be had in any form of action.

There is another class of cases cited by appellant in which the municipal corporation had a *right* to contract but had not the authority to issue the bonds or evidences of indebtedness it did, but when it issued them money was received therefore which went into the treasury of the corporation and had been used by it for corporate purposes. In such cases a recovery is allowed for the money actually received less payments made on an *implied* assumpsit for money had and received.

Or in another class of cases where the corporation has a right to issue time obligations, but they have been declared void, but the municipality by fraudulent acts of its officers, have obtained from the party seeking a recovery

his money on said obligations. In such cases a recovery can be had on account of the *mistake* and *fraud* on an *implied assumpsit.*

All the cases cited by them not heretofore commented on can be arranged under the one or the other of those heads, as will be seen from a careful examination of them, and are not those of subrogation pure and simple as claimed by appellant. We will examine them at some length.

In *Paul v. Kenosha, 22 Wis., 272,* the Court says: "The suit was against the city that issued the bonds and they were declared *void* by the circuit court, and the plaintiff was allowed to recover the amount of money and script which had been issued for municipal purposes and which had been paid the city by him for bonds which were of no value in the same action. The city has had that amount amount of money and legal scrip for its city bonds which turn out to be of no value. It seems to fall under the rule that when a party sells a obligation that turns out to be valueless, and *not of such a character as he represented it to be,* he is liable to the vendee as of a failure of consid- ation."

Now when this case is compared to those at bar, there is no analogy; because in these cases the bonds were never sold to appellant by the towns, and no *representations* of any kind were made by the towns and no money was ever received from appellants by the towns therefore. In fact the Kenosha case was the same as Wood v. Louisana, 102 U. S., where money was obtained by *false representations* of the city and placed in the city treasury, and as in that

case an action laid for money had and received, and there was no subrogation, but an *implied assumpsit.*

In the case of *Nelson v. Mayer, 63 N. Y., 543*, they held that no recovery on the contract could be had for any excess over $100,000, really affirming the case of *Donovan v. Mayer, 33 N. Y.,291*, but they held that although the contract was void, it being for over $180,000, still as the city had obtained his property without authority, and *used* it and *secured* the avails thereof, it would seem, independently of an express contract; an *implied* contract would arise to make compensation, citing

Argenti v. San Francisco, 16 Cal., 225.

In same case, pages 544 5, it is said if a city obtains money on a *void* bond, or for an illegal tax, or by *mistake* and money goes *into the city treasury*, the city can be compelled to refund. If it obtained property under a void contract and actually *uses* the property and *collects* the value of it from property owners by means of assessments, the plainest principle of justice require that it should make compensation for the value of such property to the person from whom it was obtained. The city in such case, however, should be held liable only for the *actual value of the property* or what it obtained therefor, and would not be concluded by the contract price." Now this clearly shows that in such cases it is on an *implied* contract, and that *alone* that it can be held, even when the money goes into the city treasury. Thus clearly bringing it within and supporting the case in 102 U. S., being the old common law action for money had and received, and not a question of subrogation in any sense of that word, and showing that a law court has jurisdiction but not equity. Besides no

mistake of fact is proven or *fraud* of any of the officers of the town, or that the towns ever received *a cent of the money* of complainant, but the money went directly to the railroad company without any request of towns, but appellant made the investment *volunturialy*, and the bonds were a donation by towns.

But on examining the *Nelson v. Mayer* case further you will see that it was decided not on the principle of the *implied* contract, but on the principle that the legislature could in the first place have authorized the city to contract *without* limit, it could also ratify or confirm when done in excess of the existing law, and having by the law of 1872, ratified acts already done to any amount, the contract was itself *valid*, and the act of 1872 had provided for its payment, thus showing that the case is no authority on the question of subrogation.

The case of *Mayer v. Mayer*, 63 *N. Y.*, 457, cited by appellants is not a case of subrogation, but a case of the payment of an assessment on lot 27 instead of lot 28, block 98, by *mistake* and a suit brought to recover it back, the tax on lot 27 not being cancelled, and the title to said lot being unchanged, and the city having the *money*, it was held an action would lie for money *paid by misatke* which in this state is the common law action of money had and received.

In the case *School District v. Lumbard*, 2 *Dell.*, 493, was one where the school districts sought relief against the bonds held by Lumbard, and which bonds were issued for far greater sums than the district ever had received, and in some instances had been issued where nothing had been received. In this case you see the districts are the actors.

and seeking relief, but in each of said instances the court held, all the districts would be compelled to pay, would be the *actual value received by them and interest thereon less all payments made*, on the theory of an implied assumpsit, and the other one "that he who seeks the aid of equity must do equity." This was held to be the law in the same case where relief was sought.

In *Shirk v. Pulaski Co.*, 4 *Dill.*, 214, where it was sought to subrogate the holders of void warrants to the rights of the payee of such warrants, some of which were issued for five and ten dollars for one of value received, it was held that the holder of such void warrants might be subrogated to such *legal claim* as the payee had, subject to any payments that had been made. In other words the holder could collect, if not barred by the statute on an implied obligation, for all the money received by the county, less what payments had been made.

In the case *Wood v. Luisiana*, 5 *Dill.*, 124, is the same case repoted in 102 U. S. and in *Gause v. City of Clarksville*, 5 *Dill.*, 180, was a case where the bonds were declared void, but an amendment was allowed in the same action, and additional counts, as it were, added in the nature of money had and received, in order to allow a recovery on them for the money *actually received* by the city. The court says, still adhering to the decision Wood v. Louisana, we will treat the holders of the bonds as assignees of the original payee in respect to the *money actually lent the city*, and if the city, after *obtaining* it, it was expended for *municipal* purposes, the amount advanced with lawful interest, less payments, could be recovered, citing

21 N. Y., 490, and 19 Wall., 468 484.

Now even these cases in Dillon, which go farther than and other cases, really are founded on the theory of an *implied* assumpsit, and not on the real fact of being subrogated to the rights of the original party, as all that can be collected is the money actually received by the municipality, and went into the corporate treasury, and was used for *corporate* purposes, and on an examination of said cases all the parties issuing said obligations had authority as in the 15 N. Y., to issue *time* obligations for the purpose of borrowing money for the objects claimed to be used, but on account of some fraudulent acts of said officers, they were held void, but the payee on the faith of them parted with his money, and it was used by the municipalty.

The cases at bar are entirely at variance with that principle, as in all of them no authority whatever was in existence to make time loans, and no *representations* of any kind were made by said towns or their agents, and last but not least, not a cent of money was obtained for said bonds that went into the municipal treasury, but the whole thing was a donation, thus clearly showing the principles in said cases announced does not apply, and no subrogation can be decreed or ever an implied assumpsit.

They say the doctrine of subrogation rests on the principle of natural justice, and in such case it will be enforced.

Can a case of stronger equity be supposed than the *Litchfield case*, 114 *U. S.*, 190, when the city issued $50,000 in bonds and sold them, and a great part of the money went to pay contractors for constructing the water works, which the city was then using, and obtaining revenue therefrom, and when sued on said bonds repudiated the

whole transaction in a suit where Buchanan, an owner of some of the bonds, was a party, and courts held them void and on filing a bill showing said facts and praying a decree against the city for the amount of money, and if not paid in a reasonable time the water works to be sold to satisfy it.

All the above facts were substantially proven, and presented a case of money being appropriated and derving revenue from the investment, but this court held an action at law would lie if *any thing*, and dismissed the bill.

Here was a strong case for the doctrine of subrogation to operate, if it could be allowed in such cases of municipality, and it no doubt would have been, if there could have been any legal excuse therefor, as it seems like a very hard case, but it fully shows that the cases of subrogation cited by appellant do not apply to cases similar to those at bar.

Can you conceive of a case where the bonds of a municipality have been declared void, that subrogation would not exist, if it does in cases at bar? I think not, for all the cases show authority to vote aid or to subscribe, and the bonds have been issued to the wrong corporation as in the *Fulton Co. case, 10 Wall.*, or without the forms of law as in the *Jasper Co. case, 101 U. S.*, but although they are void, if aid is consummated by the issue of bonds according to the doctrine of appellant, then the purchaser succeeded to all the rights any person might have under the law had it been strictly complied with.

This we submit is not the law as governing municipal corporations from the authorities heretofore cited, and can not be when they knowing all the *facts voluntarily* part with their money in buying said bonds, and take no express

contract of any kind except such as is shown on the face of said bonds.

II.

STATUTE OF LIMITATIONS.

The true position of appellant even under the broad doctrine as laid down in the Dellon reports, and under the facts in cases at bar, are broader than allowed by the authorities as heretofore shown, but which for the sake of the argument we will assume is, that as the appellant bought said bonds for value, and they were subsequently decided by the courts to be void on account of the want of power to issue them, then it should be allowed to collect from appellee towns the money actually paid therefor, and which the towns had received the benefit of on the doctrine of an *implied* assumpsit the consideration of which had wholly failed.

Moses v. McFarlan, 2 Burr. 1005.
Louisiana v. Wood, 102 U. S., 298.
Litchfield v, Baldwin, 114 U. S., 192.
Ramsey v. Clinton Co., 92 Ill., 229.
Paul v. Kenosha, 22 Wis., 272.
Nelson v. Mayor, 63 N. Y., 548.
Argenti v. San Francisco, 16 Cal., 225.
Meyer v. Mayor, 63 N. Y., 457.
Curtis v. Leavett, 15 N. Y. 93.
Oneida Bank v. Ontario Bank, 21 N. Y., 496.

All the above cases and many others of same purport, show this is the only ground on which appellant could stand. But we have all along contended, and still contend, they could not stand on *that* positioa because there never were any *representations* of any kind made by the officers of said municipal corporations, they were authoirzed to

make, that in the least were *false* or tended in the least to to mislead appellants; and there is no claim made of any mistake of *fact*. And the towns never received a cent for any of said bonds that went into the municipal treasury and was used by the towns for corporate purposes; but the whole matter from one end to the other, was a donation pure and simple to the railroad company. Hence we have always claimed the appellant could not stand in the shoes of the railroad company. But for the sake of argument admiting they did : How was it with the company ?

It cannot be claimed that any acts of the officers of the town in issuing said bonds or in passing resolutions in reference thereto, could in any manner bind the towns. The record spoken of by the supervisor in the books of the company, was about the time of said vote as alleged, and one which he had no authority to make, as we see by examining the law and the vote of the people. All the other acts of said officers were after July 2, 1870, when the new constitution went into effect absolutely prohibiting any officer or even the corporate authorities, from binding the town for any such purpose unless in the manner proposed by a vote of the electors at a regular meeting held prior to July 2, 1870, under then existing laws. Therefore, we say, not even the railroad company could claim any more than is shown by said vote, and that is an aid to be paid when the road is completed through said town, and Watseka made a point on the road, and to be paid by the levy and collection of a tax for that purpose on the property situated in said town. And as this was the only mode of paying said aid, it by necessary implication, excluded all others.

This being the state of the case nothing can be

claimed by the issue of the bonds or any acts of said officers as decided in the 82 Ill., 562. Then how could the railroad company after building said road in the manner provided by the vote, collect said aid, supposing payment refused? Clearly only by action. And that being the case, what statute of limintations would apply? At the time of said completion the following statute was in force:

"All actions founded on account, bills of exchange, or promises not in writing, expressed or implied, shall be commenced in 5 years after the cause of action accrued."

This, we claim, was the only section the railroad company could have brought suit under, and appellants cannot claim greater rights.

The first section reads as follows: "All actions founded on any promissory note, simple contract in writing bond, judgment, or other evidences of indebtedness in writing, made, caused or entered into, shall be commenced within 16 years after the cause of action accrued."

Statutes of 1869, Scates Comp., 752.

These statutes show that to come within the 16 years clause the writing itself must on its face purport to be for the payment of money or property at a certain time. But can it be said when the people vote a certain aid of donation to a railroad company to be paid by levy and collection of a tax if the road is built through the town in a certain place, without in any way being at the time able to say whether the railroad company will receive the donation as voted, is a promise in writing to pay at a certain time?

The mere statement of the proposition carries with it

its own refutation. We have at all times claimed such votes were mere *propositions* by the people to railroad companies to be accepted or not as they saw fit, and not in any sense of the term *contracts* in writing. In fact this very question was squarely decided when the constitutional question was made, that the vote was a *contract*, as it is here by appellant contended, in case of *Portsmouth Savings Bank v. Concord, 92 U. S., 629 and 630*, and on which point said case has never been in the least shaken, and in so doing this court used following language: "The popular vote in favor of an appropriation was *was not of itself an appropriation*, and the town was not *authorized* to make it until the railroad was located and constructed *through* the town. The town voted it would make a donation provided the company would run its road through the town. June 20, 1870, the company gave notice of its acceptance. But the town was not *empowered* to make a donation till the road was located and *constructed through* the town. It had *no authority* to make a contract to give. *There was no contract to be impaired.*"

This case is entitled to a great deal of weight on this point, as it is a question made in the case and squarely decided under the very act now under consideration. To the same effect in principle is the case of

Marsh v. Fulton Co., 10 Wall, 682.

It seems to us from an examination of the law and the vote, there is no other construction to be placed on it than the one that it is a mere *proposition of aid*, which, when the road is built and the conditions complied with, would be collectable and not before. To the same effect is *Concord v. Robinson, 121 U. S., 166*, in which this court in passing on the validity of bonds issued under the act of

March 7, 1867, say: "It neither expressly nor by implication invested the municipal corporation embraced by its provisions with power to issue commercial paper in payment of an appropriation so voted. No such implication arises from the grant of power to appropriate moneys to aid in construction of a railroad accompanied by a provision directing the levy of a tax to meet the aid and prescribing no other mode of payment, as it was by the act to be *paid* as soon as the road was located and *constructed through* the town voting the aid, which is inconsistent with the idea of the issue of bonds. On page 169 court says, The corporate authorities, the electors of the town, voted in favor of leving a tax for the purpose of raising $25,000 in two years, to be donated to the C. D. & V. R. R. Co. if said road was run through the villages of Concord and Sheldon, which was not done. The electors never voted to issue bonds to pay donation voted, and if the officers of town ever had authority under the constitution to issue the bonds that power was by the constitution of July 2, 1870, before the issue of the bonds withdrawn, and as the bonds were not issued till 1871 purchasers were bound to know neither act of 1867 nor Feb. 26, 1869, conferred such authority, and the act of March 24, 1869, did not oblige the authorities to issue them, and the constitution of 1870 did not allow the burden to be increased, and therefore the bonds are void. In this case this court sustains the Supreme Court of Illinois in the Middleport case in 82 Ill., 562. To be sure the court says the constition of Illinois does not attempt to lessen any of the rights of the railroad company, which no one claims, but from all the reasoning in the case, all the rights said railroad company had after it had performed the condition spoken

of in the vote, it could have sued the town for the amount so voted, and the courts would have held there was then an *implied* promise to pay and entered a judgment for that amount against the town, and compelled its officers by mandamus to levy a tax to pay said judgment; but it seems to me no one would claim the vote was anything more than a proposition of aid on condition and when condition was performed assumpsit would lie, but no express written contract, but one implied by law.

The facts in Robinson v. Concord, effectually refute the claim of appellant that the vote of itself was an aid and a contract between said towns, and the railroad company, because in that case the road was never completed and no aid was ever due, although as shown in the Portsmouth Savings Bank, 92 U. S., 629, the railroad company June 20, 1870, made a written acceptance of the aid with all the conditions thereto appended. This case also shows so clearly that the vote is not a contract in writing, and refutes the dicta quoted from the Illinois cases by appellant.

Anthony v. Jasper Co., 101 *U. S.*, 696, is analagous. Marion township authorized the issue of bonds to aid a railroad company on certain conditions, and when so voted their bonds should be issued by the county for and on account of the township. The county made the subscription and issued the bonds and levied the taxes on the towns therefor, and by this means the county treasury was to pay the bonds. Now it will not be claimed this is a contract "When vote is taken it is mere authority for the county to subscribe and deliver the bonds and the subscription and bonds are the real and only contract, and is one by the

county; but the law authorizes it to be paid by taxes levied on the particular town."

They cite the cases of *Chinique v. People*, *78 Ill.*, *576*, and *C. & I. R. R. Co. v. Pickney*, 74 *Ill.*, 277, *and Fairfield v. Gallaten Co.* 100 *U. S.*, 47, to show the vote of itself is a contract in writing and binding on the towns for 16 years.

When you come to examine the case in 78 Ill., you will see it arose in a case where the payment of taxes were being litigated, and the question now before the court was not one of the questions in the case, and what is said was mere dicta and could have but little force if any, and was never decided on even the reasoning or dicta on this question, but an entirely different one.

In the case in 74 Ill., there is no allusion to this question in any way, not even in dicta; but the only real question decided is that donations as well as subscriptions, are saved by constitution of 1870.

In the Gallatin Co case the question is not decided in any manner, but simply overrule the Concord case on the donation question, following on that question, and that alone, the 74 Ill., 277. Therefore we present the act under which vote was had, and the vote itself and the decisions of this court on the very act and question supported by several analagous cases showing it is *not a contract*, and if the vote is not a contract, how could it be contended it was a *promise in writing!* In fact all the authorities show such a vote of itself is no promise in writing although the law requires certain things to be submitted to the voters and a record made thereof, still this is not what the

authorities or statute means by a *promise in writing* "made caused or entered into," but is simply such acts from which a promise may on certain contingences be *implied* in law and 5 years apply as shown by the statute and following authorities.

In *Town of Oran v. people, 19 Brad., 176.* which was a mandamus against the officers of a town, that had been divided to apportion the indebtedness of said town more than five years after the debt had been created, and for which bonds had been issued, but which bonds were not due, it was held that the five years limitations applied, citing

Co. of Piatt v. Goodell, 97 Ill., 92.

Now all the proceedings for dividing a town are of record as provided by statute as in cases at bar, and the statute also provides for the division of the debts, and here was a debt that was not due, but as the town had been divided more than five years statute applied, regardless of debt not being due.

In *Eaton v. Henagan*, 17 *Brad.*, 156, which was an action on a judgment of a J. P., the court held as the action was not begun till after ten years, it was barred under §15 and 16 of the State of Loui., without deciding whether it was an evidence of indebtedness in writing, but from language used would seem to imply it was not in writing, and if so the five years statute would apply.

In *School District v. School District*, 105 *Ill.*, 655, which was a suit by one district against another district, that had by mistake received from the school treasurer $1.981. 63 of money collected for taxes in complainant district in years 70, 71, 72 and 73, and paid out to the other

district by the treasurer by mistake. Bill was not filed till September 6, 1880. The Statute of Limitations was pleaded by answer, and Supreme Court says, "The bill shows in its face more than five years had elapsed between last payment and filing of bill, and nothing proved or alleged justifying the delay. It is simply a case of money had and received for use of another, and in any such cases equity requires relief to be sought within time prescribed at law. The analagous suit at law would be five years, and same should be in equity, citing

Hancock v. Harper, 86 Ill., 445.

In such an instance all the acts of the school treasurer are evidenced by records as in cases at bar, and the school directors only draw money by written orders on the treasury, but the Supreme Court does not hesitate for a moment to apply the five years limitation.

In *Ramsey v. Co. of Clinton* 92 *Ill*., 228, which was a bill filed by the county to recover money overpaidto the Clerk, and the defense to said bill was that an action of law would lie and the statute of limitations of five years.

Court held an action for money *had and received would lie*, and the limitations of five years was applicable citing authorities.

It seems to me these authorities are conclusive of the question of the Statute of Limitations of five years, and certainly the reasoning of the courts are in favor of that act, even supposing the appellant has a standing in a court of equity. This last proposition we deny for several reasons In the first place it parted with its money *voluntarily* knowing all the facts, and was only mistaken as to the law

(and the scales never dropped from its eyes till the decision of the case in 82 Ill., 562,) and it received on the delivery of said bonds, although void, just what it bought, nothing more or less, as shown by the following authorities.

Otis et al v. Cullum, 92 U. S., 448.
Lambert v. Heath, 15 M. & W. 486.
Meyer v. Mintonye, 106 Ill., 424.

"The city of Galena was incorporated under the general law of Illinois, and therefore had no power to enact an ordinance requiring a merchant to take out a licence. *City of Cairo v. Bross, 101 Ill., 475,* and although its officers *fraudulently represented* to the party there was such an ordinance, and he then paid his money for the same, but did it *voluntarily*, and not under protest or duress. Held he could *not recover for money had or received* as ignorance of the law is no excuse, and it is a settled principal of law that when *money is paid voluntariiy in the absence of fraud or mistake it cannot be recovered back*"

Colden v Galena, 19 Brad., 411.

Even supposing appellant stood in the shoes of the railroad company, it could not come into a court of equity to obtain relief. We have shown, we think, that this is an *implied* contract in the railroad company on the vote if anything, and on such a claim by authorities heretofore shown an action for money had and received would lie, or on the implied promise to pay when condition was performed, and then all the party would have to do would be to sue in name of railroad company for its use, and if railroad company objected indemnify it, and then it could control the case as decided in *Sumner v. Sleeth*, 87 *Ill.*, 500. But even such a case does not authorize a resort to equity.

Hayward v. Andrews, 106 U. S., 675, 677, and authorities cited.

In *Sch. Dist. No. 2. v. Sch. Dist. No. 4, 16 Brad., 654*, which was a case of the division of a district, and the appraisement of the property thereof giving to Dist. 4. $162.00. Of course, this whole matter appeared of record in conformity with the statute, and showed that Dist. 2 held the above sum for Dist. 4, and the Supreme Court had held in *School Directors v. School Directors, 73, Ill., 249*, it could not be enforced at law, but only in equity, still as no bill was filed for 13 years the statute of limitations applied and barred the suit. Thus clearly showing that five years is the limit in such cases.

It seems to me the cases cited in 56 Ill., 339, and 64 Ill., 379, by appellant on this point are different. In each of these cases there was a particular promise to pay in writing. In the first case when certain notes secured by a mortgage should be collected, and in the last case on demand, and therefore the statute of 16 years would apply.

In the case cited in 16 Ill., 538, which was a case where Peoria county had sold two lots and received the pay therefor, but had not made the party a deed, and some time thereafter deeded said lots to other persons, receiving an advance on the first price; and on a bill filed for specific performance by first purchaser, it was held that the second purchasers being innocent, the relief asked could not be granted, but the county should pay the sum received from the second purchrser and interest thereon in analogy to the real action of ejectment as regards the limitations. This is a good law in that kind of a case, and the real reason is shown in the case of

Hancock v. Harper, 86 Ill., 452.

When the court in a case where they held the 5 years

statute applied, use this language : "True if a legal title would in ejectment be barred by twenty years adverse possession, courts of equity will act upon the like limitation, and apply it to all claims of relief sought upon equitable titles or claims touching real estate." Citing

Angell on Lim., § 26, and Dugan v. Gettings, 3 Gill, 138.

An examination of the case of Hancock v. Harper will clearly show the distinction and show the 16 years limitation does not apply to cases like those at bar.

If there were any facts that show complainant is not within the statute, they should be set forth particularly in the bill to show it is not barred, and if not so stated the bill will be demurable.

Henry Co. v. Winnebago Drainage Co, 52 Ill., 301.
Ball v. Johnson, 111 Ill., 379.
Walker v. Ray, 111 Ill., 320.

Equity is governed by a statute of limitations same as a court of law, and in some cases go farther, bar a party when not at law, on account of some unexplained laches.

Golden v. Kimmell, 99 U. S., 201.
Walker v. Ray, 111 Ill., 322.
Storys Eq. Pl., § 756.

III.

RES ADJUDICATA.

We claim that when these several towns in 1876 filed their bills against the appellant, to have the bonds issued by them severally, set aside and declared void, to which suits the appellant personally appeared and defended, and which were carried to the Supreme Court of the State, and then declared the bonds void and remanded, with directions

to enter up decrees in conformity with said decisions, it was then the duty of appellant to have set up all *legal* and *equitable* claims it had against said towns arising out of said bonds, or on account of being the owner thereof, and failing to do that, it should under the authorities be forever barred from bringing suit on said bonds or any claim arising out of said transaction.

But appellant says they knew nothing of said rights at that time, and if they had it would not have been germane to said cause, and could not have been legally made.

We will attempt to prove the position taken by us that it is *res adjudicata* by the authorities. And also attempt to prove that the one taken by them is not the law.

In our examination we have been unable to find an authority, that goes to the length of holding, that when a town is seeking the aid of a court of equity to have bonds issued by its officers declared void, on account of the want of authority in the officer issuing, in such case the defendant was not entitled to recover in that suit all that he *equitably* was entitled to.

In fact such never could be the law, as it would refute one of the maxims of such a court; "He who seeks equity must do equity."

This maxim is demonstrated almost daily in the foreclosure of mortgages, where usury is set up in the answer, and if proven, no interest will be allowed on the loan, as the mortgage is the actor. But if the one giving the mortgage files the bill to redeem, setting up the usury the maxim is applied, and he will although the usury is proved, be compelled to pay legal interest.

Again if a party files a bill to set aside a sale of lands on an execution, and the sale is set aside, he will be compelled to pay what the party paid at the sale that went to pay the debt of complainant, thus applying the maxim.

In *Kinny et al v. Knoebel et al*, *51 Ill.*, 126, which was a bill filed by Kinny et al to set aside a sale of lands en masse, under executions issued on judgments against Kinny and others, Morrison setting up said facts in his answer. The court below having dismissed the bill holding the sales good, Supreme Court hold sales bad, but held that as Morrison had satisfied the liens of the creditors on the property, and had acted fairly and without fraud, he should in that same action be subrogated to the rights of the creditors, and Kinny should not have the relief sought only on the condition, as he is seeking relief in a court of equity, by paying to Morrison all his purchase money and interest and taxes and for lasting valuable improvements, not of an ornamental character made before suit was brought. And also to allow him to remove all such statuary and other ornamental expenditures that would not be detrimental to the freehold.

Now this was done in the suit where the other party was seeking to avoid the sale, and clearly shows our position correct that the former suit is *res adjudicata*.

To the same effect is *Paul v. Kenosha*, 22 *Wis.*, 272, where a bill was filed to have bonds declared void, and in same suit defendant was allowed to obtain a decree for what *equitable* belonged to him, and was received and appropriated by the city.

In all the following cases which were suits to have

bonds declared void and cancelled, the defence in same suit was allowed, and the corporation held liable for what it had received from the defendants for said void bonds.

School District v. Lumbard, 2 Dill., 493.

Shirk v. Pulaski Co., 4 Dill., 214.

Gause v. City of Clarkesville, 5 Dill, 180.

All these and many others could be shown demonstrating that maxim, showing the appellant in the original cases could, if entitled to relief in the cases at bar, obtained the same relief there, and that shows of itself without the citation of authorities, that it should be *res adjudicata*, in order to avoid multiplicity of suits, and compel a party when he has an opportunity to set up all his causes of action or means of defense, or for ever after hold his peace. We are not left to reason alone on this point, but are fully sustained by authorities as following will show.

When parties are before the court by due service, in a suit for foreclosure, in which a former decree was rendered court says, "then they had the opportunity to set up the defense of usury and payment, and unless prevented from doing so by the complainant in that suit, they are now estopped from urging such grounds for relief."

Dyer et al, v. Hopkins et al, 112 Ill., 174.

In *Kendall v. Stokes, 3 How., 97*, which was a suit by Stokes against Kendall, after the matter had been reffered to arbitrators in a matter where he as Postmaster General of the U. S. was on one side, and Stokes on the other, and an award made and paid, Stokes as he avers in the first count of his declaration having failed to prove the damages now claimed, and which he sustained. In passing on the case court says: The question is, can a party after

a reference, an award, and the receipt of money awarded maintain a suit on the original cause of action, on the ground he had not proved before the referee all the damages he had sustained, or damages exceeded the award? We think not, citing

Dunn v. Murray, 9 B. & C., 780.

In *Stockton v. Ford*, *18 How.*, *420*, which was a subsequent bill filed by the party setting up the further equitable right, as the attorney of Prior, who was claimed to be the mortgagee, for fees and costs provided for in the assignment to Jones.

Court says: "But the question was properly involved in the former case, and *might* have been there raised and determined. The *neglect* of the plaintiff to avail himself of it, furnishes no reason for another litigation. We are satisfied that the former suit constitutes a *complete* bar to the present."

In *Cromwell v. Co. of Sac*, 97 *U. S.*, 352, court says, "There is a difference between the effect of a judgment, as a bar against the prosecution of a second suit, on the *same* claim or demand, and its effect in another action between the same parties on a *different* claim, or cause of action. In the *former* case if rendered on the merits, is an *absolute bar* to a subsequent action. It is a finality as to the *claim or demand in controversy* concluding the parties not only as to every matter offered and received, to sustain or *defeat* the claim, but as to any other admissable matter which *might* have been offered for that purpose."

"That a judgment estops, not only as to every ground of recovery or *defense actually presented* in the action, but

also as to every ground which *might have been presented*, is strictly accurate, when applied to the demand or claim in controversy. Such *demand or claim* cannot be brought into litigation between the parties upon *any* ground whatever."

The above case was affirmed and followed in
Davis v. Brown, Id., 428, and in
Campbell v. Rankin, 99 U. S. 263, and
Stout v. Lye, 103 U. S., 71.
Scotland Co. v. Hill, 112 U. S., 185.
Bryan v. Kennett, 113 U. S., 198.

In *Case v. Beauregard, 101 U. S., 692*, where a former suit in equity was pleaded as a bar when the same *claim* was in litigation between the same parties. Court says, "Thus it appears the bill exhibited all that was necessary to give the court jurisdiction, over the subject matter and the parties, and over all the *equities* now asserted by the complainant in the present suit. It must therefore be held that the decree dismissing the bill determined the equities of the case. Nothing that can now be done in another suit can take away the effect of that decree. Even were we of the opinion that the case was erroneously decided it would still be a bar to the complainant, a protection to defendants."

The case of *Stout v. Lye, 103 U. S.*, is a very strong case in support of our position. There Lye was indebted to a bank to which he had given a mortgage to secure his indebtedness. He was also indebted to Stout. Stout began suit in the U. S. Circuit Court. After this the bank began a suit in a state court to foreclose, but did not make Stout a party. Stout obtained judgment v. Lye, and after

this the bank obtained a decree against Lye for full amount of mortgage. After this Stout filed a bill in aid of his execution in U. S. Circuit Court to set aside decree on mortgage, setting up payments and usury and that the bank was not authorized to take mortgage. On these facts court held Stout bound by the decree of foreclosure in state court, saying citing *Cromwell v. Co. of Sac*, 94 *U. S.*, 351, 352, "it concluded the parties and those in privity with them, not only as to every matter that was offered and received, to sustain or *defeat* the *claim* or demand, but as to any other admissable matter which *might* have been *offered* for that purpose. It is true the mortgagor did not set up as a defense, that the bank had no right to take the mortgage, or that he was entitled to certain credits because of payments of usurious interest, but he was at *liberty* to do so. Not having done so he is now *concluded* as to all such defences and so are his privies."

It seems to us from all the foregoing authorities, and from the facts in these cases, that appellant could in each of the former suits in equity, have set up and it was its duty then to have set up, its equitable claim to the money paid out by it on said bonds, and it could then have obtained the very relief it is now claiming by said bills, were it even entitled to such relief as the authorities fully show the relief would have been granted, and could have been then claimed if they were or are now entitled thereto.

There can be, and is no claim that the facts now are any different than they were then, although they say in their brief they did not know of their rights till after the decision by the Supreme Court of Illinois. When the facts are not changed, and nothing set up showing any

fraudulent acts of the towns, to in any way conceal the rights or claims of the appellant, they were bound to know their rights and set them up in their answers, when said cases were remanded by the Supreme to the Circuit Court.

Nor can there be any pretense that what is now set up as a claim, was not in existence then, and arose simply out of the buying of said bonds, and is part of, and arising out of the very things then in controversy between said parties.

So taking any view of said cases you choose, under the stated facts, it must under the foregoing authorities be held *res adjudicata*.

In conclusion, therefore, we say there are three perfect defenses to said suits, either of which would uphold the Circuit Judge in sustaining the demurrers, and dismissing said bills :

First, They are not entitled to subrogation.

Second, The statute of Limitations of five years.

Third, Former adjudication.

For foregoing reasons we therefore ask that the decree in each of said cases be affirmed.

ROBERT DOYLE,

Solicitor for the Towns.

124-534-551

Supreme Court, U.S.
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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1887.

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THE ÆTNA LIFE INS. CO. *vs.* THE TOWN OF MILFORD *et al.*	No. 1136. Appeal from U. S. Circuit Court, Northern District of Illinois.

BRIEF AND ARGUMENT IN REPLY.

JAMES H. SEDGWICK AND O. J. BAILEY,
Counsel for Appellants.

PEORIA, ILL.:
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BRIEF AND ARGUMENT IN REPLY.

Counsel for appellees has, in his brief herein, fallen into a curious misapprehension of the purpose for which and the point on which we made citations of authority in

our brief. After commenting on some of those authorities, and one, *Carpenter* v. *Brenham*, 40th Col., 239, which we did not cite at all, he says, on page 13, "These are some, and the principal, of the authorities cited by them on the question of subrogation, and on a careful examination of them it will be seen they do not apply to the facts in any of the cases at bar from which any right to subrogation could be claimed."

The curious thing is, that before making this remark, he had not commented on a single case that we had cited as supporting our right to subrogation on the facts in the cases at bar. The cases he had commented on we had cited, if at all, on the point that, "The equitable assignee of a *chose in action* has the right to go into a court of equity to have his interest therein established; and when so established, he will have the right to complete relief in the same action," elaborated from the bottom of page 12 to the top of page 17 of our brief. In the court below the counsel had made the point that our remedy, if any, was at law, not in equity. Those authorities were cited by us to show that subrogation, in all its phases, is an independent equity, and a party has the right to go into a court of equity in the first instance to have it established, and the court having jurisdiction for that purpose, may go on and give complete relief. It is true that some of these cases arose on states of fact, not on all fours with these cases; but they all uphold the doctrine they were cited to support. And by labored argument to show that they are not in point to uphold some proposition they were not cited under, and therefore argue that our brief was a failure on such other proposition, to uphold

which it cites other sufficient authorities, is, to put the best face on it, a curious misconception. That we have the right to subrogation on the facts in the cases at bar is abundantly shown by the other authorities, cited by us on that point, on pages 12 and 18 of our brief in chief.

When we bought these bonds we did not buy mere pieces of paper; we bought, as stated in our bills, the debts of these towns represented. And, as said by Sheldon, sec. 34, in equity we are entitled to be subrogated to all the rights of our vendor in what we purchased, even though not expressly conveyed. The bills place our right to subrogation distinctly on this ground. We do not claim to have paid the debts of the towns, or ask subrogation under any such branch of the doctrine.

And with due respect to the counsel, we are forced to say that in the analysis of cases he has been as unfortunate as in his conception of points they were cited to support.

Take, for instance, *Morgan* v. *Hammett*, 23 Wis., 30. A reference to the case will show that Morgan was a volunteer (if buying vountarily makes a volunteer), both in buying the Jones securities (one of which was a released mortgage, the other a mortgage by one having only a part interest,) and in buying at the void administrator's sale. Yet the court, "on principles of natural justice," subrogate him to the lien of the debt secured by the released mortgage, and to the lien of the debts against the estate paid off by the sale. This is a subrogation to valid obligations, represented in bad ones that he had purchased, precisely similar

in principle to the cases at bar. Yet counsel says that it "is not at all analagous to the standing of appellant in cases at bar."

So *Bishop* v. *O'Connor*, 69 Ill., 433, is strongly relied on by appellee's counsel as showing that "no right of equitable subrogation will be given to a vendee at a sale made by an officer of the law," notwithstanding *McHaney* v. *Schenck*, 88 Ill., 359, cited by us, which is to the effect that subrogation will be given in such a case where the sale turns out void. But there is no contradiction in the cases. In *Bishop* v. *O'Connor* it is held that where the judicial sale is to satisfy a lien, the purchaser will, if the sale turns out void, be subrogated to the lien, though in making the purchase he is a volunteer. The case only holds that in Illinois a simple contract debt of the decedent is not a lien on his lands in the hands of his heirs at law ; that there is, therefore, in such a case, no lien that the purchaser at an administrator's sale to pay such debts can be subrogated to, and equity will not, in favor of such purchaser, make that a lien on land which was and is not a lien of its own force. The question in the case was of priority of liens. But subrogation applies as well to give a party a simple debt as a lien, where it will really benefit him, and he is, in justice and equity, entitled to it, as was done in *Wood* v. *Louisiana*, 5 Dill., 124, affirmed by this court in *Louisiana* v. *Wood*, 102 U. S. 298, and in the other cases, like the ones at bar, cited by us on that point. That the equity courts of Illinois, in decreeing subrogation, do not confine themselves to the classes of cases mentioed by Judge Walker in the *dictum* in *Bishop* v. *O'Connor*, see

Hoppin v. *Hoppin*, 96 Ill. 270.

Tyrell v. *Ward*, 102 Ill. 29, 39, and cases cited.

In the last case, especially, it is shown by the citations and the decision that subrogation is, as a matter of fact, often decreed to help those that may be termed "Volunteers." All which shows how the doctrine of subrogation finds favor with the courts for the promotion of justice and equity.

Chancellor Johnson, of South Carolina, used the language, in *Gadsden* ads. *Brown*, Speers' Eq. Reports, p. 41, in a case similar in principle to that of many later cases where subrogation has been allowed, as in *Tyrell* v. *Ward*, 102 Ill., 37.

The cases in Illinois, cited from Bradwell, are not in a court of final resort. It is the Appellate Court, intermediate between the Circuit Court and the Supreme Court; and the statute provides that "the opinion (of such courts) shall not be of binding authority in any cause or proceeding other than in that in which they may be filed."

Starr & Curtiss' Stats. of Ill., vol. 1, p. 703, par. 37.

Ib., vol. 3, p. 142, par. 37.

While we hold the opinions of the Judges of those courts in great respect, we would hardly cite them as authority to the Supreme Court of our own State, or to this court.

But the case in 20 Brad., p. 629, *Suppinger* v. *Garrells*, and the authorities cited in it, do not hold that one in our case is a "stranger or volunteer."

Those terms are used of one who comes forward and pays the debt of another, without being asked, and without

being under any compulsion so to do. But that this term does not apply to a purchaser, is clear, from *Young* v. *Morgan*, 89 Ill., 200, cited to support the Bradwell case, where Morgan had bought land, agreeing, as a part of the purchase money, to pay a trust deed on it, and at the same time paid the trust deed; yet he was subrogated to its lien to cut out junior judgments. So in *Beaver* v. *Slanker*, 94 Ill., 183, Kleinworth had voluntarily bought land subject to the lien of a judgment. At an execution sale on that judgment he bought the land again. The land had belonged to Johnson, of whom he bought, who was surety for the debt that had merged in the judgment. Kleinworth was reimbursed for his last purchase, at the execution sale, by being subrogated to the rights of the payee of that debt against the principal debtor, though the point was made in the case, and argued by counsel as strenuously as in this case, that Kleinworth was only a "volunteer."

So in all the cases cited by counsel, the term "volunteer" is used, not of a party who *purchases* somewhat, but of one who comes forward and pays off the debt of another, without being asked or in any way compelled thereto. And it is a misapplication of those authorities, to attempt to apply them to the cases at bar. Counsel himself admits, on pages 23 and 25 of his brief, that there is subrogation in other classes of cases, but goes on fining and refining, trying to draw distinctions, till he loses himself in the cases cited by us from *Dillon* and *Louisiana* v. *Wood*, affirmed in this court, thereby affirming the principle that the purchaser of void municipal bonds is subrogated to the rights of his vendor against the municipality issuing them.

The towns had authority to make these contracts at the polls, with the railroad company. They did make them, and thereby got the railroad. Instead of fulfilling their contracts, they issued void bonds to represent them, the bonds reciting on their face that they are valid, issued in pursuance of the acts of the legislature, referred to in our brief, and of the votes of the people. We buy the bonds, on the faith and credit of such representations, believing we get a transfer of the debts therein mentioned. We buy in actual good faith, and pay over the money. We do not intend to pay the debts of the town. Neither do we buy mere pieces of paper, with printer's ink on them ; we buy the debts represented, or supposed to be represented, in the bonds. And while, by reason of the failure of the bonds as negotiable instruments, we do not get a legal title to these debts, we are yet the assignees, in equity, of them ; and, as such, have the right to come into a court of equity and be subrogated thereto. This is our case. It seems quite clear to us, that the authorities cited by us, as well as sound reason, support it. That is enough for us, and we are quite indifferent whether or not they support imaginary cases of counsel in other classes of the general doctrine of subrogation.

Otis v. *Cullum*, 92 U. S., 448, cited by counsel, was not a case of subrogation at all. There was no claim by plaintiff that there was anything to be subrogated to. He had bought void bonds by delivery simply, without any express or implied warranty of their goodness, and sued the person of whom he bought. The court held that there was nothing to sue on. The defendant had been guilty of no

tort and entered into no contract. That case would have been authority against us if this suit was against the railroad company, of which we bought, for the consideration paid. But, instead of that being our case, we simply say that the railroad company has the legal title to these contracts with the towns; that the issuing of void bonds by the towns did not satisfy these contracts, but the railroad company still holds the title to those contracts in trust for us, we having paid it the amount thereof, on the faith and credit of these void bonds.

Lambert v. *Heath*, 15 M. & W., 486, was cited in *Otis* v. *Cullum*, and is applicable to that sort of a case—not to the cases at bar.

Counsel for the towns says that we are not entitled to this subrogation, because we made a mistake, not of fact, but of law. But the doctrine of subrogation does not depend upon that of mistake, but on the justice and equity of making the subrogation. Whether the mistake of the purchaser is one of law or fact, he is entitled to be subrogated to everything that equitably belongs with his purchase. (See authorities cited on pages 17 and 18 of our brief.) We may add that if one, through misapprehension or mistake of law, parts with property, a court of equity may grant relief, if, under the general circumstances of the case, it would be unconscionable for the party benefitted by the mistake to retain that benefit.

See Kerr on Fraud and Mistake (O. F. Bump's Edition), p. 398, etc.

But in our case, if we made a mistake, it was induced by the recitals in the bonds; and the authorities cited in Kerr are all to the effect that a party in such a case, whether the mistake is one of law or fact, is entitled to such relief as a court of equity can give him. Certainly he is entitled to be subrogated to all that justly and equitably belongs with his purchase.

But what mistake of law did we make? The bonds recite these laws, which, on their face, give power to issue the bonds. In the Middleport case they recite, after referring to said acts, a "vote of the electors of said township, at a special election, held on the eighth day of June, 1867, in accordance with said act." In the other cases, votes of the electors are recited in accordance with the act of 1867; and the ratifying provisions of the act of February 26, 1869, are referred to as also authorizing the issue of the bonds.

We made no mistake of law in supposing that the legislature might ratify a previous vote of the people.

Boles v. *Elmwood*, decided by this court last term.

The act of February 26, 1869, is quoted so far as pertinent, on pp. 3-4 of our brief. Sec. 3 of that act expressly gives the power to borrow money and issue bonds for the aids that had been voted.

The Supreme Court of Illinois, in *Middleport* v. *Ætna*, 82 Ill., 566, questions the constitutionality of this section. But, "waiving this objection," it says: Yet the officers who issued the bonds had no express authority from the voters of the town, the "township authorities," under the later acts, to do so. This was a question of fact. Had the

supervisors and town clerks who executed the bonds authority from the "township authorities" so to do? The bonds recite that they were issued "in accordance with these laws." This amounts to a recital that the "township authorities," under the act of February 26th, 1869, had authorized the issue of the bonds. As a matter of fact, this turned out to be untrue. Yet it was a matter of fact, not not of law.

But it matters little as to the character of the mistake we made—whether of law or of fact. We honestly supposed, and the railroad company honestly supposed, that we were buying, and the railroad company was selling, valid obligations of these towns, based on undisputed legislative authority to vote the aids, votes of the electors of the towns in pursuance thereof, subsequent ratification by the legislature, authority to the towns to issue bonds to fund the aids, and bonds issued by the towns in pursuance thereof. This is what the railroad company sold and what we bought and paid for, in all good faith. This is what the bills in these cases aver.

See printed records, pp. 6–7, *Middleport* case;
" " pp. 5–6, *Milford* case;
" " pp. 7–8, *Belmont* case.

Certainly, as against the railroad company, under these circumstances, we are, in equity, entitled to whatever is valid in these town obligations, the bonds representing them having turned out to be void as commercial paper. And the towns have no reason to complain, because their obligation was fixed at the polls.

Chinquy v. *People*, 78 Ill., 576.

Also by being accepted by the railroad company, and its laying and constructing its track in accordance therewith.

Pages 4 and 5 of printed records.

Such obligation was not cancelled by the issuing of these void bonds.

Marsh v. *Fulton Co.*, 10 Wall., 676.
Louisiana v. *Wood*, 102 U. S., 298.
Anthony v. *Jasper Co.*, 101 U. S., 693.
Paul v. *City of Kenosha*, 22 Wis., 256.
Curtis v. *Levitt*, 15 N. Y., 1.
Nelson v. *Mayor*, 63 N. Y., 544.
Gauze v. *Clarksville*, 5 Dill., 180.
Shirk v. *Pulaski Co.*, 4 Dill., 214.
School District v. *Lumbard*, 2 Dill., 493.

On these obligations the towns are still liable, and we are entitled to be subrogated to them.

Louisiana v. *Wood*, 102 U. S., 298.
Wood v. *Louisiana*, 5 Dill., 124.
Gauze v. *City of Clarksville*, 5 Dill., 180.
Shirk v. *Pulaski Co.*, 4 Dill., 214.
School District v. *Lombard*, 2 Dill., 493.
Sheldon on Subrogation, Sec. 34.

Unless some statute of limitations has run against them, or unless we have estopped ourself from insisting on our equity by not setting it up in the cases decided by *Middleport* v. *Ætna*, 82 Ill., 562.

This brings us to these points:

ESTOPPEL.

Had the bonds been valid, we would have had no equity to a subrogation, because we would have had legal title to the obligations of the towns represented in them. So long, therefore, as we supposed the bonds valid, we could not lay claim to such equity. We relied on what we thought to be our legal rights in the matter.

When the towns filed bills in equity to have the bonds declared void, we insisted that the bonds were valid. The towns insisted that they were void. That was the issue, and the only issue in *Middleport* v. *Ætna;* and until that case was decided we had no suspicion that the bonds were, or would be declared invalid, and therefore we did not know, and could not know in that suit, that we had any such equity of subrogation.

This equity, therefore, was not passed on in that suit at all, neither was it essential to the decision made therein, as *Black* v. *Comrs.*, 99 U. S., 693, holds essential to an estoppel.

That we might have set it up had we chosen to waive our legal rights and reliance on the bonds, does not estop from insisting on it now. For as *Cromwell* v. *County of Sac*, 94 U. S., 353, *Davis* v. *Brown*, Ib. 428, hold:

"The inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined."

The thing actually litigated and determined in that case was the validity of the bonds as interest-bearing, negotionable paper; nothing more and nothing less.

Our present claim or demand was not litigated in that case at all. It is a different claim or cause of action. It is only where the claim is the same, and hence is involved necessarily in the former determination, that it is barred in the second suit between the same parties, if it might have been set up in the first. When the claim is different, it is not barred if it might have been introduced into the first suit, but was not. The distinction is very clearly drawn in *Cromwell* v. *County of Sac*, and there is no excuse for the counsel's misapprehension and misapplication of the authorities on this point.

Again: The Chicago, Danville & Vincennes Railroad Company was not a party to *Middleport* v. *Ætna*, or any of those cases.

The legal title to these town obligations, to which we seek to be subrogated, is vested in it. It could not be deprived of that legal title in a case to which it was not a party. That would be like seeking to forclose a trust deed, or to establish or to carry out any other trust, in a case to which the trustee was not a party.

The towns might well have objected: "Our promise was to the railroad company; its rights must be barred in the same decree that orders us to perform that promise to the insurance company."

So as those cases stood, without making the railroad company a party thereto, we would not have been entitled

in them to a decree subrogating us to its rights, as we ask in these suits. And the court would not have made the towns do equity to us, even had we asked it, without at the same time being in a position to bar the rights of the railroad company in these town obligations, so that we could not have had this relief in those cases.

These cases are brought to get the legal title of the railroad company to these town obligations. Until we get that, we have not received all we bought of the railroad company, because we have not received all of the subject matter it had, and all we paid for.

We bought the debts of the towns, and have received only void pieces of paper. The former suit simply decided the paper void, and did not touch our present demand, nor was it necessarily involved therein.

THE STATUTE OF LIMITATIONS.

Appellee still insists that there is only an implied assumpsit of the towns, on the facts stated in our bills, to pay us for the benefits they had received in the building of the railroad, and therefore the five year statute of limitations has barred our claim. The reply to this is that our bills do not state any such case. They state a "valid, legal contract in writing, whereby, upon fulfillment by said (R. R.) company of the conditions thereof, said town was bound to pay said appropriation to said company."

See printed records : p. 3, Middleport case : p. 4, Belmont case ; p. 3, Milford case.

They further state that the railroad company, on its part, assented thereto and complied with the conditions thereof: p. 4, Milford case; p. 4, Middleport case; p. 4, Belmont case.

They further state that such contracts were afterwards, and before the construction of the railroad, confirmed by additional acts of the Illinois legislature, viz: by the acts of February 26, and March 24, 1869.

See p. 4 of the several printed records.

Then they state another acceptance by the railroad company, and a construction and completion of its tracks on the faith and credit thereof. Ib.

And they proceed to show subsequent evidences in writing of the contract in the records of the various towns. In the Middleport case, the records of the resolutions of the town auditors, at their meetings of February 10, 1871, and April 1, 1871, at which the amounts due the railroad company on the town contract were settled and audited, and the issue of bonds approved. See pp. 4-5, printed record.

In the Milford case, the execution of the bonds by the town, "by its town clerk and supervisor," and the delivery of them to the railroad company, on the completion of its track, by the town, "through its authorized agents and officers." P. 5, printed record.

In the Belmont case the division of the indebtedness of original Belmont between the new towns erected on its territory, viz: Belmont and Grenard, March 23, 1871, by the joint action of the supervisors and town clerks of the

new towns, and the placing of the bonds in the hands of a trustee to be delivered to the railroad company when the track was completed according to contract; the delivery of the bonds to the company, and the resolution of first Tuesday of April, 1876, in annual town meeting, by the legal voters of the new town of Belmont, defendant herein reciting the issue of the bonds, in compliance with the previous vote of the town, and ordering a tax levied on the taxable property of the town to pay the interest thereon.

See pp. 5 and 6 of printed record.

How anyone can, in the face of these allegations, say that the bills make a case of *implied* promise on the part of the towns to pay us the money we paid for the bonds, on the ground that the towns had received the benefit thereof, we are unable to comprehend. The promise of the town is an express promise, evidenced in writing, to pay, not us, but the railroad company. Had the promise been to us, whether expressed or implied, we should have sued at law. As it is an obligation to pay the railroad company, and as we did not, by buying void bonds supposed to represent it, acquire the legal title thereto, but did become entitled to be subrogated thereto, we come into equity, the proper forum to decree such subrogation. The statute of limitations is set up by the towns. The question under it is whether their promises are express and evidenced in writing. The railroad company pleads no statute of limitations. As against its trust, for our benefit, it would not have been available if plead. But it is not plead for the railroad company, and the towns can only plead the statute for themselves and for a defense to their own promises. That these

promises do not come within the five year statute it seems to us that we have abundantly shown by our brief in chief.

The list of authorities on page 32 of appellee's brief, cited as showing that the only ground we can stand on is that of implied assumpsit, shows nothing of the sort. *Argenti* v. *San Francisco* was expressly decided in favor of the plaintiff on the ground that his contracts with the city were valid, though the formal contract with the commissioner was invalid. See 16 Cal., pp. 263, 279-282. The same distinction exists in these cases. The contracts of the towns with the railroad company are valid, while the bonds intended to represent them are void. In the California case no question of subrogation arose, as the void contract was not negotiable, and had not been assigned, as in the cases at bar.

In *Curtis* v. *Leavett* the same distinction is drawn. The contracts were valid, but the securities were void, as in the cases at bar. See 15 N. Y., p. 98. And the court holds, on page 103, that the *assignees* of the Philadelphia banks, as well as the banks themselves, were entitled to the benefit of the contract and the pledge to secure it. The argument all through the case is that the real thing is the contract, not the mere form it may happen to take in void securities.

In *Paul* v. *City of Kenasha*, 22 Wis., 256, no question of subrogation arose, because the plaintiff got the void bonds directly from the city that issued them. He recovered the money back "as upon a failure of consideration." P. 273. This is simply authority to show that the issuing of the void bonds did not satisfy the liability of the towns on

their contract to the railroad company. It is needless to say that it is not authority to show that we, as assignee of the void bonds for value, are not entitled to be subrogated to the interest of the railroad company in those contracts, or that anything in the transaction changed those contracts from express contracts in writing to implied contracts.

Ramsay v. *Clinton Co.*, 92 Ill., 225, was an action in equity by a county against its clerk to recover back money claimed to have been paid him by mistake. The court held the action would not lie. No question of subrogation arose in the case; and there was no record shown, as in these cases, to take the case out of the five year statute of limitation.

The cases in 63 N. Y., *Nelson* v. *Mayor*, and *Meyer* v. *Mayor*, were cited by us to the point that the issuing of void securities on a valid contract would not extinguish such valid obligations. There is nothing in them to indicate that our only ground of recovery is implied assumpsit. In *Litchfield* v. *Baldwin* (Ballou) 114 U. S. 192; no question of subrogation, or of the grounds on which relief of that character is administered, arose. The court held the plaintiff could no more recover on the indebtedness, than on the bonds. Both were made invalid by the Illinois constitutional provision. That is not our case. The city in that case was not under express or implied obligation to pay, or have a lien enforced on its water-works, because the constitution barred all indebtedness, and such a lien was impossible.

In *Lousiana* v. *Wood*, 102 U. S. 298, there was a valid obligation to pay; the bonds were void. Ten

of the bonds had been issued to the plaintiff, one to Dorsheimer and one to Gibbons, who had transferred them to plaintiff. The plaintiff was allowed, under the code practice of Missouri, where equitable rights may be administered in an action at law, to recover on the bonds he held by purchase as on those issued directly to him. In other words, *he was subrogated to the rights of the first holders of the bonds*, as we in this case ask to be subrogated to the rights ot the railroad company. It is a case directly in point, supporting our right to the subrogation. But while he was subrogated to an *implied* obligation, we ask to be subrogated to *express* obligations. There is no reason why subrogation shall not be allowed in one case as well as the other.

There is nothing in the case to show that the only ground of subrogation is an implied assumpsit. This court is not in the habit of making decisions of that kind without any law to support them.

Without further review, it is easy to see how the confusion of counsel in citing authorities arises. He persists in regarding this as an action against the towns on an implied assumpsit by one who has received void bonds from it for a valid *implied* obligation. All his observations about the necessity of our showing false representations by the towns, and mistake of fact, not of law, on our part, fits with such a case. As he is so persistent in stating our position incorrectly, we can only be as persistent in correcting him. The legal obligations of the towns run to the railroad company, not to us. They are *express* obligations, not implied. We are not suing the towns on them, but asking to be sub-

rogated to the legal rights of the railroad company therein; and as equity has jurisdiction for that purpose, it may and should go on and do us complete relief. Especially now, because if it stops simply with subrogation, and turns us over to a court of law, we shall be deprived of the benefit of what it does for us, the sixteen year statute having run since the commencement of this suit. And, since equity can do full and complete relief in this case, it is under special constraint to grant it—the constraint of justice and equity, which is dominant in these courts.

Counsel finds fault with the language of the Supreme Court of Illinois, in *Chinquy* v. *People*, 78 Ill., 576. Well he may, for it is very clear against him. It was in review of a judgment for taxes. One of the objections to the judgment was that the tax levy included interest on $100,000 of county bonds, issued for railroad purposes, and which increased the levy to a larger per cent. than authorized by the constitution. The vote for the bonds was taken before the adoption of the constitution.

Art. 8, Sec. 9, of that instrument prohibited the county from levying a tax exceeding seventy-five cents on the $100, except for indebtedness *existing at the adoption of the constitution*. Hence it became necessary to decide whether the vote alone was an indebtedness of the county, saving the bonds afterwards issued from that inhibition of the constitution.

The court say: "It was not necessary to issue the bonds to create an indebtedness. As well contend that because the bonds are not due there is no debt, when all

know the debt exists, although it may not be due. So, in this case, there was a debt, although the bonds had not issued, nor had the time arrived for its payment. *It was, therefore, an indebtedness* existing, within the meaning of that clause of the fundamental law."

If this is a *dictum*, as counsel call it, what would be a direct decision in point? But to put the matter beyond all question, we state in these bills, that the railroad company accepted the donation or aid; located its line on the faith and credit thereof, and proceeded to build its road to completion; all evidenced in writing. And under the limitation law, it is only necessary that there should be an evidence of indebtedness in writing to postpone the bar for 16 years.

There is nothing in any of the cases cited by counsel, to shake our position, that the contracts of the towns in the cases at bar are evidences of indebtedness in writing.

In *Town of Oran* v. *People*, 19 Brad., 176, there had been no apportionment of the indebtedness by the supervisors and assessors; hence there was no evidence of indebtedness in writing; neither was there in

Piatt v. *Goodell*, 97 Ill., 92; or in

Ramsey v. *Clinton Co.*, 92 Ill., 226.

In *Eaton* v. *Henegan*, 17 Brad., 156, the court expressly say that whether a justice judgment is such evidence, is not before them, and therefore do not decide it.

In *School Directors* v. *School Directors*, 105 Ill., 655, there was no evidence of the indebtedness in writing. It depended on the testimony of the township treasurer and

his account books, not records at all. The point was not made in the case, and not mentioned in the opinion of the court.

So in *Hancock* v. *Harper*, 86 Ill., 445, there was no evidence of indebtedness in writing. The only witness was the plaintiff himself. See p. 447.

School District No. 2 v. *School District No. 4*, 16 Brad., 654, was a case under the limitation law of 1872, where ten years bars an evidence of indebtedness in writing. See vol. 2, Starr & Curtiss, p. 1553, par. 16. As no bill was filed for 13 years, the debt was plainly barred by the above statute. To cite that case in this is very wide of the mark.

Of course we need not say that one direct decision on the statute in a case in point by the court of last resort, whose duty it is to construe the statute, as was the case in *Bourland* v. *County of Peoria*, 16 Ill., 538, is worth infinitely more than any number of cases where the point did not arise on the facts, or was not presented to the court for its decision, and where consequently the court did not pass upon it at all. And if the court is not one of last resort, as in the Bradwell cases, and its opinions are by statute expressly made nonauthoritive in other cases, the citation of that class of cases to overcome a direct holding of the supreme court on the point, throws no light on it. With due respect to the counsel, it is " darkening knowledge."

In the midst of his discussion on limitations, counsel pauses to say that we have no standing in a court of equity, citing *Otis* v. *Cullum*, 92 U. S., 448; *Lambert* v. *Heath*, 15

M. and W., 486, and *Meyer* v. *Mintonye*, 106 Ill., 424. We have already shown that the two first cases presented no question of subrogation. The expressions in them were used in view of different states of fact from ours, and were not intended to deny the right of subrogation where there was anything to be subrogated to. That right is established by *Mechanic's Bank of Alexandria* v. *Seton*, 1 Pet. 299.

Adams' Equity, star pages 79, 80, (p. 189 of 5th Am. Ed.), in discussing the circumstances under which equity will grant the specific performance of a donation, says: "If the donor has perfected his gift in the way which he intended, so that there is nothing left for him to do, and nothing which he has authority to countermand, the donee's right is enforceable as a trust, and the consideration is immaterial." And the rule is the same at law as in equity. Ib.

Now, clearly, before the new constitution of Illinois went into effect, July 2, 1870, the towns had placed themselves in that attitude towards the railroad company, creating an express trust, or legal obligation, which ever you choose, in its favor by voting the aids. There was nothing left for them to do except to perform their agreements on compliance by the railroad company with the condition of the votes. Everything was of record, which is evidence in writing sufficient to take a case out of the five year statute of limitations.

Bourland v. *County of Peoria*, 16 Ill., 538.

If, on such compliance by the railroad company, the towns had failed to perform, that company might either have brought an action at law against the towns, obtained

judgment, and had the tax levy enforced by *mandamus*, or proceeded in equity in the first instance to enforce the trust. That is a question we do not enter into, because to us it makes no difference whether the proper remedy of the railroad against the town would have been at law or by bill in chancery.

If in chancery, we, as the equitable assignee of the trust, by virtue of the facts which give us the right to subrogation thereto, have the right to file our bills against the railroad company and the towns to have our right thereto determined, and enforced against the towns.

Or, if regarded as obligations of the towns, sueable at law by the railroad company, we have the same right to file our bills in equity, showing facts from which equity would conclude an equitable assignment, to establish and have adjudicated our equitable right to subrogation thereto. And the court having obtained jurisdiction for that purpose, may go on and give complete relief in the same action.

It is unnecessary to add that the default of the railroad company and demurrer of the towns, admits the statements of our bills.

Having now gone over these cases in all aspects of them that suggest themselves, or are suggested by appellees' brief, and finding nothing to shake our confidence that equity can, and therefore will, give us relief according to the right and justice of our case, we respectfully submit them to your honors.

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